THE LAW's DISPOSAL OF A PERSON's ESTATE

Who dies without WILL or TESTAMENT;

SHEWING

In a plain, clear, eaſy, and familiar Manner, how a Man's FAMILY or RELATIONS will be intitled to his REAL and PERSONAL ESTATE by the LAWS of ENGLAND, and the Cuſtoms of the City of LONDON and Province of YORK.

THE SECOND EDITION,

Reviſed, corrected, enlarged, and improved.

TO WHICH IS ADDED,

The DISPOSAL of a PERSON's ESTATE By WILL and TESTAMENT;

CONTAINING

INSTRUCTIONS and neceſſary FORMS for every Perſon to make, alter, and republiſh his own WILL:

LIKEWISE

DIRECTIONS for Executors how to act after the Teſtator's Death, with reſpect to proving his Will, getting in the Effects, and paying Debts and Legacies.

By PETER LOVELASS, of the INNER TEMPLE, Gent.

LONDON:

Printed for the AUTHOR, and ſold by P. URIEL, Inner Temple Lane; T. WHEILDON, Fleet-Street; J. BUCKLAND, and J. BEW, Paternoſter-Row; and R. SPENCE, Ouſgate, York.

MDCCLXXXVI.

THE

PREFACE.

FROM the number of books which contain the ſcience of our law, and the numerous applications to perſons converſant therein for advice concerning the title to real and perſonal eſtate in caſes of inteſtacy; it is indiſputably clear that no ſelection could be made from the venerable pile of law-learning, more immediately uſeful, than that which relates to the eſtates of perſons dying inteſtate; and of this the author hereof being convinced, was led to ſelect the firſt part of this work, to which he has now made a very conſiderable addition, by an explanation of the law relative to laſt wills and teſtaments; and here, as well as in his former proceedings, hath endeavoured to avoid the technical terms of the law; and when the Latin words, or thoſe terms have occurred, and could not be avoided without obſcuring the ſenſe, has added the Engliſh to the one, and explained the meaning of the other; laying down the whole with ſuch clearneſs and perſpicuity, as might render the ſame perfectly intelligible and eaſy of comprehenſion to thoſe unacquainted with the ſyſtem of our law, or the phraſes commonly uſed by writers thereon.

In the firſt impreſſion of this work, entitled the Will which the Law makes, &c. care was taken in explaining the different kinds of eſtates and effects a man might die poſſeſſed of, and in what manner the law would operate on failure of his having made any diſpoſition thereof; ſhewing who would be entitled to the adminiſtration of his perſonal eſtate, and the method to be purſued by the adminiſtrator for obtaining it; and after the ſame was obtained, in what manner he ſhould proceed for getting in the deceaſed's effects, and adminiſtering the ſame by paying debts, and diſtributing the ſurplus to ſuch as were intitled thereto: likewiſe to whom the real eſtate would deſcend; how far the ſame might be liable to the anceſtors debts; the title an huſband had thereto by the courteſy of England, and a wife with reſpect to dower. A few months after this had gone forth to the publick, up ſtarts a book entitled, "A "familiar, plain and eaſy explanation of the law of "wills and codicils, and of the law of executors and "adminiſtrators, and alſo the rules by which eſtates, "freehold and copyhold and perſonal eſtates in "general deſcend and are to be diſtributed, &c. "by a barriſter, &c." now appearing by the name of T. E. Tomlins, who not only attempts an explanation of thoſe particulars which I had before explained, but preſumes to lay down inſtructions for perſons to make their own wills, with a variety of other matters, in about half the compaſs of my preſent edition, and advertiſes his work at the price of two ſhillings and ſixpence.

From whom Mr. Tomlins has derived this explanation, as he calls it, I ſhall ſubmit to the judgment of

of thoſe who have read my work, whether his performance is not an abridgment of the heads thereof, and if he has not, inſtead of explaining them, totally omitted the very material points neceſſary for the Reader's information, and that without citing even one author, whereby an explanation of what he had advanced might have been diſcovered.

With reſpect to Mr. Tomlins's knowledge, even in what he has advanced, I ſhall here mention two points laid down by him as poſitive law, and which are concerning joint-tenancy and dower; as to the former, he expreſsly lays it down, that "in all caſes "if one joint-tenant makes a will and deviſes his "ſhare of the lands, though he dies before the "other joint-tenant, it would not be good; *yet* if "he outlives the other joint-tenant the deviſe ſhall "be good for the whole eſtate, becauſe he has the "whole by ſurvivorſhip." But by lord Mansfield and the court of king's bench, in the caſe of *Neale* and *Roberts* [a], and two authors who have related this caſe from Sir James Burrows's reports, we are informed, that a will made by a joint-tenant during the continuance of the joint-tenancy, is not a good will, even as to his ſhare of the eſtate under the ſtatute of wills; and that notwithſtanding there may have been a ſubſequent ſeverance of the joint-tenancy, by a partition made after the time of making the will and before the teſtator's death, unleſs there be a republication of it after the partition [b].

Concerning dower, Mr. Tomlins tells us, that a "widow is entitled to dower, that is, *the rents* during

[a] Burr. Manſf. 1488.

[b] See joint-tenancy treated on, Page 129.

" her life of one third part of all ſuch lands as her " huſband had at any time during the marriage." This I conceive Mr. Tomlins muſt have learned from ſome old matron who had always been accuſtomed to the city, and not from any country dame, much leſs from a lawyer, of whom he might have been informed that woman ſhall be endowed, and thereby ſhall abſolutely have, hold and enjoy, during her natural life, one third part of all ſuch lands, tenements and hereditaments, as her huſband was at any time during her coverture ſeiſed or poſſeſſed of, either in fee ſimple, or fee tail, unleſs there be ſome ſpecial reaſon to the contrary; and hereof I had made particular mention, and expreſsly laid it down from the beſt authorities [c]; yet concerning this Mr. Tomlins by his work appears to have had as juſt a conception as he had of the law relative to joint-tenancy; but where I had through an overſight cited the ſtatute 19 Geo. III. c. 66, for the ſtatute 20 Geo. III. c. 28, there I find juſt the ſame in the book entitled An explanation of the law of wills and codicils, &c.

[c] See Page 96—98.

THE

CONTENTS.

CHAP. I.

CHAP. II.

CHAP. III.

CHAP. IV.

SECT.

CHAP. V.

THE DISPOSAL OF A PERSON'S ESTATE BY WILL AND TESTAMENT.

CHAP. I.

Eſtates

CHAP. II.

CHAP. III.

How

CHAP. IV.

CHAP. V.

APPENDIX.

ERRATUM.

Page. Line.

96.—28. *after*, fee-tail general, *dele* period, and *add*, if there is no remainder or reverſion expectant thereon, for barring of which a recovery muſt be ſuffered, as mentioned p. 242.

THE LAW's DISPOSAL Of a PERSON's ESTATE Who dies without Will or Testament.

CHAP. I.

Of Inteſtates. Of Adminiſtration; why it ſhould be obtained, and who are entitled thereto. By whom it is to be granted. The Method of obtaining it, and the Expence thereof. How the ſame may be revoked.

SECTION THE FIRST.

OF INTESTATES.

THERE are divers kinds of inteſtates. One that makes no will at all; another that makes a will and executors, and they refuſe to act: in this caſe he dies *quaſi inteſtatus*[a]; that is, as if inteſtate. But this latter is not that kind of inteſtacy here intended: for in this caſe the law does not diſpoſe of the eſtate; as here adminiſtration is to be granted *cum teſtamento annexo*, that is, with the teſtament annexed; and then the duty of the adminiſtrator is very little different from that of an executor[b]; he being to adhere to the teſtament, which is to be his guide in diſpoſing of the eſtate and effects of the deceaſed. But as the former is that which is here intended, I ſhall briefly take notice of the diſtinction Wentworth makes between a will and a

[a] 2 Inſt. 397.

[b] Black. Com. 2 V. 504.

teſtament,

teſtament, without entering into a minute diſcuſſion of inteſtacy, which would be foreign to this ſubject, and therefore ſhall be reſerved for the latter part of this work[c]; it being our preſent intention to ſhew how the law diſpoſes of a perſon's eſtate in caſe he dies wholly inteſtate, and not to point out the various kinds of inteſtacy.——It is called a will, ſays Wentworth, when there is an executor appointed; and when there is none, it is termed a teſtament. So there may be a will where there is no teſtament, and a teſtament where there is no will. And where a teſtament is made without an executor being named, this teſtament is to be adhered to as a guide to the adminiſtrator in diſpoſing of the eſtate, in the ſame manner as where one or more executors are named, and they refuſe to act[d].

SECTION THE SECOND.

OF ADMINISTRATION: WHY IT SHOULD BE OBTAINED, AND WHO ARE ENTITLED THERETO.

AN adminiſtrator cannot act before letters of adminiſtration are granted to him; he not being like an executor, who may do many acts before he proves the will; but an adminiſtrator may do nothing till letters of adminiſtration are iſſued[e]. When letters of adminiſtration are iſſued, the perſon deputed by the ordinary, that is, he who grants the letters of adminiſtration, to adminiſter the inteſtate's goods; ſhall have an action to demand and recover, as executor, the debts due to the inteſtate[f].

IF the deceaſed dies wholly inteſtate, without making either will or teſtament, then general letters of adminiſtration muſt be granted by the ordinary to ſuch adminiſtrator as the ſtatutes of 31 Edw. III. c. 11. and 21 Hen. VIII. c. 5. direct; and in conſequence of which the ordinary is compellable to

[c] See Page 170.
[d] Went. Off. Exec. 2.
[e] Black. Com. 2 V. 507.
[f] Stat. 31 Edw. III. c. 11.

grant

grant adminiſtration of the goods and chattels of the wife to the huſband, or his repreſentatives [g]; that is, his executors or adminiſtrators, who, if the huſband dies before adminiſtration taken, will be intitled in equity, and not the wife's next of kin [h]. And that the adminiſtration of the wife's goods of right appertaineth to her huſband, is confirmed by the ſtatute of the 29 Car. II. c. 3. which enacteth, that the ſtatute of the 22 & 23 Car. II. c. 10. (commonly called the ſtatute of diſtributions), ſhall not extend to the eſtates of femes-covert that ſhall die inteſtate; but that their huſbands may demand and have adminiſtration of their rights, credits, and other perſonal eſtates, and recover and enjoy the ſame [i]. But if the wife was executrix to another; then, as to the goods which ſhe had in that capacity, adminiſtration muſt be granted to the teſtator's next of kin [k].

BY the ſtatutes of Edward the Third and Henry the Eighth, before mentioned, the ordinary is compellable to grant adminiſtration of the huſband's effects to the widow, *or* next of kin. But he may grant it to both, or either, at his diſcretion [l]. For, it being moved for a mandamus [m] to the

[g] Black. Com. 2 V. 504.

[h] Cro. Car. 106. 1 P. Will. 381. 3 Atk. 526.

[i] The huſband has ſeldom occaſion for taking adminiſtration on the death of his wife, unleſs it is to recover ſomething that appertained to the wife, which ſhe was not poſſeſſed of during the marriage; for immediately on the marriage, all the chattels-perſonal ſhe is poſſeſſed of veſt in her huſband, and her chattels real he may make his own if he will. What theſe are, ſee p. 28, 29.

[k] 3 Salk. 21.

[l] Black. Com. 2 V. 496. 504.

[m] Mandamus is a writ, whereby a command iſſues in the King's name, from the court of King's Bench, directed to any perſon, corporation, or inferior court of judicature, within the King's dominions, requiring them to do ſome particular thing therein ſpecified which appertains to their office and duty. And this writ may be obtained for an infinite number of other purpoſes. It is grounded on a ſuggeſtion, by the oath of the party injured, of his own right and the denial of juſtice. Black. Com. 3 V. 110.—The matter for which this writ is obtained muſt be laid before the court. 3 New Abr. 528. And as the matter muſt be laid before the court, it muſt be in term time, when the court is ſitting. The manner of laying it before the court is by counſel, who moves the court on the oath of the injured party; which oath is delivered to him in writing, with his inſtructions, as previouſly drawn up by an attorney.

official of the biſhop of Glouceſter, to commit adminiſtration to the widow of an inteſtate, the court obſerved, That would be to deprive the ordinary of his election, in granting it to her, or the next of kin; and therefore ordered the mandamus to be taken generally, to grant adminiſtration of the goods of the inteſtate [n].—The ordinary may grant adminiſtration, either jointly or ſeparately; for he may grant ſeveral adminiſtrations of ſeveral parts of the goods of the inteſtate [o]; as where a man died inteſtate, leaving a wife and a brother, the ordinary had granted adminiſtration of ſome particular debts to the brother, and the reſidue to the wife. It was agreed by the court, that the ordinary might grant adminiſtration to the brother, as to part, and to the wife for the reſt, in which caſe neither could complain; ſince the ordinary need not have granted any part of the adminiſtration to the party complaining. But if the inteſtate leave a bond of 100l. the ordinary cannot grant adminiſtration of 50l. to one perſon, and 50l. to another, becauſe this is an entire thing [p].—Among the kindred, thoſe are to be preferred that are the neareſt in degree to the inteſtate; but of perſons in equal degree, the ordinary may take which he pleaſes [q]. The nearneſs of degree ſhall be reckoned according to the computation of the civil, and not of the canon law [r]: and therefore, where there be both parents and children of the deceaſed, the children are entitled to the adminiſtration in preference to the parents, though both are in equal degree of kindred; and on failure of children, the parents are entitled [s]. Then follow brothers, grandfathers, uncles, or nephews, (and the females of each claſs reſpectively,) and laſtly, couſins.—The half blood [t] is admitted to the adminiſtration as well as the whole:

n Str. 552.
o 1 Roll's Abr. 908.
p 1 Salk. 36.
q Black. Com. 2 V. 504.
r How the nearneſs of degree is reckoned according to the Civil Law, ſee page 78.
s Black. Com. 2 V. 504.
t Who the half blood are, ſee page 71. 91.

for

for they are of the kindred of the inteſtate, and only excluded from inheritances of land. Therefore the brother of the half blood ſhall exclude the uncle of the whole blood [u], and the ordinary may grant adminiſtration to the ſiſter of the half, or the brother of the whole blood, at his own diſcretion [v]. But if there is a brother and a ſiſter of the half blood, and the ſiſter is married, then it muſt be granted to the brother, and not to her and her huſband; becauſe in effect it makes the huſband adminiſtrator, who is not of kin to the inteſtate; and if ſhe die, the huſband would ſtill continue adminiſtrator, and ſo might poſſeſs himſelf of the whole perſonal eſtate [w].—If the right of adminiſtration devolves upon an infant, the ordinary is to grant adminiſtration till he arrives at the age of twenty-one; becauſe an infant cannot, before his full age, give bond to adminiſter faithfully [x]. And as ſuch an adminiſtrator is but in nature of a curator for the infant, and has no intereſt or benefit in the inteſtate's eſtate but in right of the infant, it has always been held diſcretionary in the ordinary to whom to grant it, and therefore it hath been frequently adjudged, that he is not obliged, within the ſtatute of Henry the Eighth, to grant it to the next of kin, either of the deceaſed or the infant [y].—If none of the kindred will take out adminiſtration, a creditor may by cuſtom do it. And the ordinary may, in defect of all theſe, commit adminiſtration (as he might have done before the ſtatute of Edward the third, when the ordinary had the abſolute diſpoſal of inteſtates effects [z]); to ſuch a diſcreet perſon as he approves of; or may grant him letters *ad colligendum bona defuncti*; that is, to gather up the goods of the deceaſed, which neither make him executor nor adminiſtrator; his only buſineſs being to keep the goods in his ſafe cuſtody, and to do other acts

[u] 1 Black. Com. 2 V. 505.
[v] *Ibid.*
[w] 3 Salk. 21.
[x] Godolph. 102. 5 Co. Rep. 29.
[y] Hob. 251. 1 New Abr. 381.
[z] 2 New Abr. 398.

for the benefit of ſuch as are intitled to the property of the deceaſed [a].—If an adminiſtrator dies, his executors are not adminiſtrators; but it behoveth the ordinary to commit a new adminiſtration [b]. Where the adminiſtration is granted to two, and one of them dies, the adminiſtration ſurviveth to him who is living [c].

SECTION THE THIRD.

WHERE, AND BY WHOM ADMINISTRATION IS TO BE GRANTED.

GENERALLY the perſon who is to grant adminiſtration is the biſhop of the dioceſe, or his officer, where the inteſtate dwelled [d]. And if all the goods of the deceaſed lie within the ſame juriſdiction, an adminiſtration granted by him is the only proper one; but if the deceaſed had *bona notabilia*, or chattels to the value of one hundred ſhillings, or five pounds, in two diſtinct dioceſes; then adminiſtration muſt be taken out before the metropolitan of the province [e]. But if a man die upon a journey, the goods that he then hath about or with him, ſhall not be as *bona notabilia* to cauſe adminiſtration to be committed in the prerogative [f].—Debts owing to the inteſtate are *bona notabilia*, as well as goods in poſſeſſion [g]. And they ſhall be *bona notabilia*, in that dioceſe where the bond or other ſpecialties be, and not where the debtor inhabits [h]. So judgments obtained in the courts at Weſtminſter, upon actions laid in the country, are *bona notabilia*; not where the action was laid, but where the judgment was obtained; becauſe the record is there [i]. But if the debts be only by ſimple contract, without ſpecialty, then they are to be eſteemed *bona notabilia* in the place where the debtor is [k]. So a bill of exchange ſhall be ſaid to be *bona notabilia* where the debtor is, and not where the bill is; for it is no ſpecialty in law: for if the adminiſtrator pays debts upon

a Went. Off. Exec. chap. 14.
b 1 Roll's Abr. 907.
c Caſ. Talb. 127.
d Swinb. 427.
e Black. Com. 2 V. 509.
f Swinb. 438, 439.
g 1 Roll's Abr. 909.
h *Ibid.*
i Carth. 148.
k Went. Off. Exec. 46.

ſimple

ſimple cantract, or ſuffers judgment againſt him, in ſuch actions he may plead ſuch payment or judgment in bar to an action upon a bill of exchange [l]. - Where one dies poſſeſſed of goods in London and Dublin, in ſuch caſe the reſolution ſeems to have been, that the archbiſhop of Canterbury, by his prerogative, was to grant adminiſtration of the goods in London, and the archbiſhop of Dublin for thoſe in Dublin [m]. If one die in Ireland, and have nothing but a ſpecialty for money, and that ſpecialty doth lie in England, the ordinary of the dioceſe, within which the place is where the ſpecialty lies, ſhall commit the adminiſtration; and if the ordinary of another dioceſe grant it, the adminiſtration is void: and therefore the caſe was, a merchant in Ireland was bound in an obligation of forty pounds to one J. S. in London, and the obligation was made in Ireland, but remained always in London, and the merchant died inteſtate in the county of Bedford in England, and a biſhop of Ireland did commit the adminiſtration to one, and the archbiſhop of Canterbury committed it to the wife of the inteſtate, who had the obligation; in this caſe, the laſt adminiſtration was adjudged good: and it was there held, that the adminiſtration ſhall be granted by the ordinary of the place, where the ſpecialty doth lie at the time of the death of the inteſtate, and not by the ordinary of the place where the debt began [n]. - In caſe a perſon has *bona notabilia* both in the province of York and Canterbury, adminiſtration muſt be taken out before both metropolitans, if within the juriſdiction of each there are *bona notabilia* in divers dioceſes; or elſe if in either of the provinces, the goods lay in one dioceſe, then adminiſtration muſt be taken out before the particular biſhops in whoſe ſeveral dioceſes the goods are [o]. Or if the deceaſed had goods in the juriſdiction of one metropolitan, lying in divers dioceſes, and in the

[l] 3 Salk. 164.
[m] Gibſ. 472. 4 Burn's Eccleſ. Law. 182.
[n] Shep. Touch. 443.
[o] Went. Off. Exec. 46.

other, but in one dioceſe; then adminiſtration muſt be taken out before the archbiſhop who has juriſdiction over the divers dioceſes, and before the particular biſhop of the dioceſe [p].—The granting of adminiſtration of the goods of every biſhop, although he hath not goods but in his own juriſdiction, doth belong to the archbiſhop [q].

THERE are certain peculiar eccleſiaſtical juriſdictions, where, by preſcription, or compoſition, or other ſpecial title, the granting adminiſtration of the goods of ſuch as dwell and die within thoſe places, doth appertain to the judge of that peculiar [r].—There is the court of peculiars, which is a branch of, and annexed to the court of arches. It has a juriſdiction over all thoſe pariſhes diſperſed throughout the province of Canterbury, in the midſt of other dioceſes, which are exempt from the ordinary's juriſdiction, and ſubject to the metropolitan only [s].—Where one dies poſſeſſed of goods in the dioceſe of an archbiſhop, and in a peculiar of the ſame dioceſe; there ſhall be ſeveral adminiſtrations, and the archbiſhop ſhall have no prerogative, becauſe the peculiar was firſt derived out of his juriſdiction [t]. But where one dies poſſeſſed of goods in ſeveral peculiars within the ſame dioceſe; in that caſe adminiſtration ſhall not be granted by the biſhop of the dioceſe, but by the metropolitan; inſomuch as they are exempt from ordinary juriſdiction [u].

BY the ſtatute of the 4 Ann. c. 16. ſect. 26. The power of granting probates of wills, and letters of adminiſtration, of the goods of perſons intitled to wages, for work done in her Majeſty's yards and docks, is declared to be in the ordinary of the dioceſe; or ſuch other perſons to whom the ordinary power of probates of wills, or granting of adminiſtrations do

p Went. Off. Exec. 46.
q 4 Inſt. 335.
r Swinb. 427.
s Black. Com. 3 V. 65.
t Gibſon, 472. Cro. Eliz. 719.
u Gibſon, 472. Swinb. 440.

belong,

belong, where ſuch perſons ſhall die; and the wages due to ſuch perſons ſhall not be taken to be *bona notabilia*, to found the juriſdiction of the prerogative court.

THE prerogative is grounded upon this reaſonable foundation: that as biſhops were formerly themſelves the adminiſtrators to all inteſtates in their own dioceſe; and as the preſent adminiſtrators are in effect no other than their officers or ſubſtitutes, it was impoſſible for the biſhops, or thoſe who acted under them, to collect any goods of the deceaſed, other than ſuch as lay within their own dioceſes, beyond which their epiſcopal authority doth not extend. And it would be extremely troubleſome, if as many adminiſtrations were to be granted, as there are dioceſes within which the deceaſed had *bona notabilia*, beſides the uncertainty which creditors and legatees would be at, in caſe different adminiſtrators were appointed, to aſcertain the fund out of which their demands are to be paid. A prerogative is therefore very prudently veſted in the metropolitan of each province, to make, in ſuch caſes, one adminiſtration ſerve for all [v].

IT has been declared, that adminiſtrations committed by the archbiſhop, by his prerogative, to one who did not die poſſeſſed of goods in divers dioceſes, were merely void. But the more current doctrine is, that ſuch adminiſtrations are not void, like thoſe granted by a biſhop, where are *bona notabilia*, but only voidable by ſentence; becauſe the metropolitan hath juriſdiction over all the dioceſes in his province, whereas a biſhop can by no means have juriſdiction in another dioceſe [w]. —— It is ſaid, that if adminiſtration be committed in a dioceſe where there are *bona notabilia*, though

[v] Black. Com. 2 V. 509.

[w] 4 Burn's Eccleſ. Law, 184.

ſuch

ſuch grant be *ipſo facto* [x] void, yet they do not grant a new adminiſtration in the prerogative court, before they have repealed that; and in that caſe they ſhall not be prohibited [y].

As it hath been the caſe that many have been by apparitors, both of inferior courts and the courts of the archbiſhop's prerogative, much diſtracted, by being diverſly called and ſummoned for probate of wills, or to take adminiſtrations of the goods of perſons dying inteſtate, and thereby have been vexed and grieved with many cauſeleſs and unneceſſary troubles and expences; by Canon 92. "It is conſtituted and "appointed, that all chancellors, commiſſaries, or officials, "or any other exerciſing eccleſiaſtical juriſdiction whatſoever, "ſhall at the firſt, charge with an oath all perſons called or voluntarily appearing before them for the probate of any will, "or the adminiſtration of any goods, whether they know, or "(moved by any ſpecial inducement) do firmly believe, that "the party deceaſed (whoſe teſtament or goods depend now "in queſtion) had, at the time of his or her death, any goods "or good debts in any other dioceſe or dioceſes, or peculiar "juriſdiction within that province, than in that wherein the "ſaid party died, amounting to the value of 5l. And if the "ſaid perſon cited, or voluntarily appearing before him, ſhall "upon his oath affirm, that he knoweth, or (as aforeſaid) "firmly believeth, that the ſaid party deceaſed had goods or "good debts in any other dioceſe or dioceſes, or peculiar juriſdiction within the ſaid province, to the value of 5l. and "particularly ſpecify and declare the ſame, then ſhall he preſently diſmiſs him, not preſuming to intermeddle with the

[x] *Ipſo facto* void, ſignifies that it is void without any decree or ſentence. As in the caſe of a perſon obtaining two or more preferments in the church with cure, not qualified by diſpenſation, &c. the firſt living is void *ipſo facto*, *viz. without any declaratory ſentence*, and the patron may preſent to it. Dyer, 275.

[y] 4 Burn's Eccleſ. Law, 185.

"probate

" probate of the will, or to grant adminiſtration of the goods " of the party ſo dying inteſtate. Neither ſhall he require or " exact any other charges of the ſaid parties, more than ſuch " only as are due for the citation, and other proceſs had, and " uſed againſt the ſaid parties, upon their further contumacy; " but ſhall openly and plainly declare and profeſs, that the " ſaid cauſe belongeth to the prerogative of the archbiſhop of " that province; admoniſhing the party to prove the will, or " require adminiſtration of the goods, of the court of the ſaid " prerogative, and to exhibit before him, the ſaid judge, the " probate or adminiſtration under the ſeal of the prerogative, " within forty days next following. And if any chancellor, " commiſſary, official, or other exerciſing eccleſiaſtical juriſ- " diction whatſoever, or any their regiſter ſhall offend herein; " then let him be *ipſo facto* ſuſpended from the execution of his " office, not to be abſolved or releaſed until he have reſtored " to the party all expences by him laid out contrary to the " tenor of the premiſes; and every ſuch probate of any teſta- " ment, or adminiſtration of goods ſo granted, ſhall be held " void and fruſtrate to all effects of the law whatſoever. And " it is hereby further charged and injoined, that the regiſter of " every inferior judge do, without difficulty or delay, cer- " tify and inform the apparitor of the prerogative court, re- " pairing to him once a month, and no oftener, what execu- " tors or adminiſtrators have been by his ſaid judge, for the " incompetency of his own juriſdiction, diſmiſſed to the ſaid " prerogative court within the month next before; under " pain of a month's ſuſpenſion from the exerciſe of his office " for every default therein." But it is provided that this canon, or any thing therein contained, be not prejudicial to any compoſition between the archbiſhop and any biſhop or other ordinary, nor to any inferior judge that ſhall grant any pro-

bate

bate of teſtament or adminiſtration of goods to any party that ſhall *voluntarily* deſire it, both out of the ſaid inferior court, and alſo out of the prerogative. And likewiſe, that if any man die *in itinere*, that is, on a journey, the goods that he hath about him, at that preſent, ſhall not cauſe his teſtament or adminiſtration to be liable unto the prerogative court.

IN reſpect of the prerogative court, by Canon 93, "It is "decreed and ordained, that no judge of the archbiſhop's "prerogative ſhall cite, or cauſe to be cited *ex officio* [z], any "perſon whatſoever to any of the before-mentioned intents, "unleſs he hath knowledge that the party deceaſed was, at the "time of his death, poſſeſſed of goods and chattels in ſome "other dioceſe or dioceſes, or peculiar juriſdiction within "that province, than in that wherein he died, amounting to "the value of 5l. at the leaſt: and decreed and declared, "that whoſo hath not goods in divers dioceſes to the ſaid ſum "or value, ſhall not be accounted to have *bona notabilia* "Always provided, that this clauſe here, and in the former "conſtitution mentioned, ſhall not prejudice thoſe dioceſes, "where by compoſition or cuſtom *bona notabilia* are rated at "a greater ſum [a]. And if any judge of the prerogative court, "or any, his ſurrogate, his regiſter or apparitor, ſhall cite or "cauſe any perſon to be cited into his court, contrary to the "tenor of the premiſes, he ſhall reſtore to the party ſo cited

[z] It is ſo called from the power a perſon has, by virtue of an office, to do certain acts without being applied to: as a juſtice of peace may not only grant ſurety of the peace at the complaint or requeſt of any perſon, but he may demand and take it *ex officio* at diſcretion, &c. Dalt. 270.

[a] The law concerning this matter is, that five pounds is the ſum or value of notable goods. But where by compoſition or cuſtom in any county, *bona notabilia* are rated at a greater ſum, the ſame is to continue unaltered; as in the dioceſe of London, it is 10l. by compoſition. 4 Burn's Eccleſ. Law, 181.

"all

« all his coſts and charges, and the acts and proceedings in « that behalf ſhall be held void and fruſtrate. Which ex- « pences, if the ſaid judge or regiſter, or apparitor, ſhall re- « fuſe accordingly to pay; he ſhall be ſuſpended from the exer- « ciſe of his office, until he yield to the performance thereof."

WHAT has been ſaid under this head reſpecting adminiſtration, is alike applicable to wills and teſtaments. For regularly, he that ſhall have the probate of a will, in caſe where a man doth make a will, ſhall have the granting of adminiſtration of his goods and chattels in caſe he dies inteſtate [b].

SECTION THE FOURTH.

WHAT THE PERSON, APPLYING FOR ADMINISTRATION, IS TO DO BEFORE IT IS GRANTED.

THE practice is not to iſſue letters of adminiſtration, until after the expiration of fourteen days from the death of the inteſtate; unleſs for ſpecial cauſe (as, that the goods would otherwiſe periſh, or the like) the judge ſhall think fit to decree them ſooner. On taking out letters of adminiſtration, the adminiſtrator takes an oath, which is uſually in this form: « You ſhall ſwear, that you believe A. B. « deceaſed died without a will; and that you will well and « truly adminiſter all and every the goods of the ſaid de- « ceaſed, and pay his debts as far as his goods will extend; « and that you will exhibit a true, full, and perfect inven- « tory of the ſaid goods of the deceaſed, and render a true « account of your adminiſtration into the —— court of « C. when you ſhall be thereunto lawfully required [c]." You alſo ſwear that you are the widow, ſon, daughter, next of kin, or creditor, [*as may be the caſe*] of the ſaid A. B. and

[b] Shep. Touch. 443. [c] 4 Burn's Eccleſ. Law, 231.

that

that the whole of the goods, chattels, and credits [d] he died poſſeſſed of, do not in value exceed the ſum of l. "So help you GOD."

BY the ſtatute of the 22 & 23 Car. II. c. 10. *It is enacted, that all ordinaries, as well the judges of the prerogative courts of* Canterbury *and* York, *as all other ordinaries and eccleſiaſtical judges, and every of them, having power to commit adminiſtration of the goods of perſons dying inteſtate, ſhall and may, upon their granting and committing of adminiſtrations of the goods of perſons dying inteſtate, of the perſon or perſons to whom any adminiſtration is to be committed, take ſufficient bond with two or more able ſureties, reſpect being had to the value of the eſtate, in the name of the ordinary, with the condition in form and manner following.*

"THE condition of this obligation is ſuch, that if the "within bounden A. B. adminiſtrator of all and ſingular "the goods, chattels, and credits of C. D. deceaſed, do "make or cauſe to be made a true and perfect inventory of "all and ſingular the goods, chattels, and credits of the ſaid "deceaſed, which have or ſhall come to the hands, poſſeſ-"ſion, or knowledge of him the ſaid A. B. or into the hands "and poſſeſſion of any other perſon or perſons for him, and "the ſame, ſo made, do exhibit or cauſe to be exhibited into "the regiſtry of court, at or before the day "of next enſuing; and the ſame goods, chattels, "and credits, and all other the goods, chattels, and credits "of the ſaid deceaſed at the time of his death, which at any "time after ſhall come to the hands or poſſeſſion of the ſaid "A. B. or into the hands and poſſeſſion of any other perſon or "perſons for him, do well and truly adminiſter according to "law; and further do make, or cauſe to be made, a true and "juſt account of his ſaid adminiſtration, at or before the "day of ; and all the reſt and reſidue of the ſaid goods, "chattels, and credits which ſhall be found remaining upon

[d] The adminiſtration has nothing to do with the real eſtate in caſe the deceaſed leaves any—For what is real eſtate, ſee pag. 86.

"the

"the ſaid adminiſtrator's account, the ſame being firſt examin-
"ed and allowed of by the judge or judges for the time being
"of the ſaid court, ſhall deliver and pay unto ſuch perſon or
"perſons, reſpectively, as the ſaid judge or judges, by his or
"their decree or ſentence, purſuant to the true intent and
"meaning of this act, ſhall limit and appoint; and if it
"ſhall hereafter appear that any laſt will and teſtament was
"made by the ſaid deceaſed, and the executor or executors
"therein named do exhibit the ſame into the ſaid court,
"making requeſt to have it allowed and approved accord-
"ingly, if the ſaid A. B. within bounden, being there-
"unto required, do render and deliver the ſaid letters of ad-
"miniſtration (approbation of ſuch teſtament being firſt
"had and made) in the ſaid court; then this obligation to
"be void, and of none effect, or elſe to remain in full force
"and virtue."

THIS condition, as to the adminiſtering truly, according to law, is to be intended in bringing in the adminiſtrator's account, and not in paying the debts of the inteſtate, and therefore a creditor ſhall not take an aſſignment of the bond, and ſue it, and for breach aſſign non-payment of a debt to him, or a devaſtavit committed by the adminiſtrator; for that would be endleſs [e].—By the ſtatute of the 1 Jac. II. c. 17. ſect. 6. No adminiſtrator ſhall be cited into court to render an account of the perſonal eſtate of his inteſtate, otherwiſe than by an inventory thereof, unleſs at the inſtance of ſome perſon in behalf of a minor, or having a demand out of ſuch eſtate as a creditor or next of kin; nor ſhall be compellable to account before any ordinary or judge empowered by the act of 22 & 23 Car. II. otherwiſe than as mentioned by this

[e] 1 Salk. 316.

act.

act.—The eccleſiaſtical court underſtand no more by an account, than ſome account in nature of an inventory [f]; and the ordinary, after the adminiſtrator has exhibited an inventory, cannot compel the adminiſtrator to account, but it muſt be at the inſtance of the party (as one in behalf of a minor, or one having demand out of the inteſtate's eſtate, as a creditor or next of kin); and therefore the inventory and account are, as to the ordinary, the ſame thing [g].

SECTION THE FIFTH.

THE FEES AND EXPENCE OF OBTAINING THE ADMINISTRATION.

THE fees for adminiſtration now taken by the practitioners in Doctors Commons, as I conceive, are much the ſame with thoſe taken in other eccleſiaſtical courts throughout the kingdom, and nearly the ſame as the fees that were allowed to be taken by thoſe practitioners, as ſettled by a jury, Nov. 19, 1734, and are as follows, *viz.* The whole fees for an adminiſtration under 20l. that is, where the goods, chattels, and credits, do not amount to 20l. in value; of a ſailor in the King's ſervice, 7s. For an adminiſtration under five pounds in other caſes, 7s. For an adminiſtration under 20l., 1l. 1s. And under 40l., 1l. 18s. For an adminiſtration above 40l., 2l. 5s. [h], which is now (as I conceive, by divers bills that I have ſeen paid for adminiſtrations in the courſe of ſome years paſt) about 2l. 10s. including therein the ſtamp duty for the bond before mentioned, and alſo the ſeveral ſtamp duties laid on by the ſtatutes of the 5 W. & M. c. 21. and 9 W. III. c. 25. whereby it is enacted, that for every ſkin or piece of vellum or parchment, or ſheet or piece of paper, on which ſhall be written any lettters of adminiſtration (except of common

[f] For more concerning the inventory, and what may be required of the adminiſtrator before adminiſtration is granted, ſee pag. 37—42.

[g] 3 Atk. 248. For more concerning this, ſee pag. 61—63.

[h] Floyer's Proctor's Practice, 172.

ſeamen

ſeamen or common ſoldiers ſlain or dead in the ſervice) for any eſtate above the value of 20l. ſhall be paid a ſtamp duty of 10s. And now, by the ſtatute of 19 Geo. III. c. 66. if the eſtate, for which the latter adminiſtration is taken, amount to 100l. there muſt be one pound for a ſtamp duty added to the 2l. 10s. which will make it 3l. 10s. And if the eſtate amount to 300l. or upwards, there muſt be another pound added, whereby the adminiſtration will amount to 4l. 10s. And by the ſtatute of the 23 Geo. III. c. 58. where the eſtate is of, or above the value of 100l. there is an additional ſtamp duty of 20s. which makes the above 3l. 10s. to amount to 4l. 10s. And where the eſtate is of, or above the value of 300l. there is a further additional duty of 20s. which, added to the 2l. laid on by the ſtatute 19 Geo. III. and the firſt additional 20s. laid on by this ſtatute, will make 4l. and this being added to the above mentioned 2l. 10s. will cauſe the adminiſtration to amount to 6l. 10s. And where the eſtate is of, or above the value of 600l. there is a further additional duty of 20s. which makes the adminiſtration amount to 7l. 10s. And where the eſtate is of, or above the value of 1000l. there is a further additional duty of 20s. which makes the adminiſtration amount to 8l. 10s. And the fees and expence of proving a will in common form is about 7 or 8s. leſs than what is paid for letters of adminiſtration; that is, provided the will be very ſhort; but if it is of any conſiderable length, the coſt will be conſiderably more, in proportion to the length thereof. But what has been ſaid reſpecting theſe fees, muſt be underſtood to be when the adminiſtration iſſues of courſe, or without being oppoſed, and on perſonal application made for the ſame; for if the granting it is oppoſed, the expence of obtaining it will be according to the effect of the oppoſition, or the length ſuch oppoſition may be carried to after a caveat is entered, or ſuit commenced. And if perſonal application is not made for the adminiſtration, but inſtead thereof a commiſſion is iſſued for the adminiſtrator to adminiſter (as is uſual when the adminiſtrator is ill, or lives at a great diſtance from town), the

expence of a commiſſion for an adminiſtration, inſtructions, and return, the book [h] ſays, is 1l. 10s.

SECTION THE SIXTH.

HOW, AND FOR WHAT REASON, THE ADMINISTRATION MAY BE REVOKED.

IF an adminiſtration is granted, and afterwards a will is produced and proved, the adminiſtration ſhall be revoked [i]. ——The ordinary cannot repeal an adminiſtration at his pleaſure [k].——In the caſe of Sir George Sands, the father adminiſtered to his ſon, and afterwards a woman, pretending to be the ſon's wife, ſued for a repeal; but a prohibition [l] was granted, becauſe the ordinary had an election to grant it either to the father or wife, and by granting it to the father, had executed his power [m]. But where a femecovert, that is, a married woman, died inteſtate, and the next of kin to her obtained adminiſtration, and the huſband ſued for a repeal, a prohibition was denied; becauſe in this caſe the ordinary had no power, or election, to grant it to any perſon but the huſband [n].

THE rule ſeems to be, that an adminiſtration may be repealed, although not arbitrarily, except where there ſhall be juſt cauſe for ſo doing; as if the adminiſtrator ſhould become lunatic or the like; of which the temporal courts are to judge. So if the next of kin, at the

h Floyer's Proctor's Practice, 172.

i 2 Roll's Abr. 907. See more as to this, pag. 47.

k Swinb. 381.

l A *prohibition*, is a writ iſſuing properly out of the court of King's Bench, being the King's prerogative writ; but for the furtherance of juſtice, it may now alſo be had in ſome caſes out of the court of Chancery, Common Pleas, or Exchequer, directed to the judge and parties of a ſuit in any inferior court. Black. Com. 2 V. 112. It is a writ to forbid any court to proceed in any cauſe there depending, on ſuggeſtion that the cognizance thereof belongeth not to the court. Fitzh. Nat. Brev. 39.

m Raym. 93.

n 3 Salk. 22.—See pag. 3.

death

death of the inteſtate, happen to be uncapable of adminiſtering, by reaſon of attaint or excommunication, and the ordinary commits it to another; if he afterwards becomes capable, the ordinary may repeal the firſt adminiſtration, and commit it to the next of kin [o]. And the ſame is much more to be ſaid where the adminiſtration was undue *ab initio*, that is, from the beginning, whether as granted to any other than the next of kin, or granted by an incompetent authority, or in an irregular manner, without citing thoſe who ought to have been cited [p].

WHERE a man died inteſtate, leaving a wife and a ſiſter, the ſiſter, upon the common oath, that ſhe believed he died inteſtate, without wife or children, obtained adminiſtration. And in a ſuit to repeal it, as obtained by ſurpriſe, it appeared to be the cuſtom of the court, never to grant it to the next of kin, until the wife is cited. The ſiſter moved for a prohibition, and inſiſted that the ordinary had executed his authority. But the court held, that the ordinary could not be ſaid to have executed his authority, having never had an opportunity to make the election which the ſtatute of the 21 Hen. VIII. c. 5. gives him; that it was incident to every court, to rectify the miſtakes they were led into by miſrepreſentation of the parties; that if there were no ſurpriſe (of which the court below was judge) there ought to be a prohibition, becauſe then the adminiſtration will have been duly and regularly granted; but there was a plain ſurpriſe, and therefore they denied a prohibition [q].——It is ſaid, that an adminiſtration may be repealed, without any ſentence of revocation to be given in any ſpiritual court, or otherwiſe; as by granting a new adminiſtration [r].

[o] 4 Burn's Eccleſ. Law, 236.
[p] *Ibid.*
[q] *Ibid.* 237.
[r] *Ibid.*

WHERE the adminiſtrator, after many goods adminiſtered, had his adminiſtration revoked, and it was committed to B. who ſued the firſt adminiſtrator for goods unduly adminiſtered; it was held, that there was no remedy but in *Chancery*. But it is conceived in ſuch a caſe as this, the ſecond adminiſtrator might maintain an action at law againſt the firſt, for money had and received, or trover for any goods remaining in his poſſeſſion[s].—See more concerning adminiſtration revoked, p. 50.

CHAP. II.

Of the Adminiſtrator.

SECTION THE FIRST.

HIS POWER BY VIRTUE OF THE ADMINISTRATION.

HAVING ſeen who are intitled to the adminiſtration, and of whom the ſame is to be obtained; with an account of the fees and expence of obtaining it, and how the ſame may be revoked; we may now conſider the power the adminiſtrator has, by having the adminiſtration thus granted to him. Somewhat of this we have already ſeen, as that he cannot act before it is granted to him, and that after it is, he may bring actions as an executor may[t]. We have ſeen alſo the reaſon why adminiſtration ſhould be thus granted; as that the biſhops were formerly the adminiſtra-

[s] Jac. Law Dict. 10 edit. tit. Adminiſtrator. [t] Page 2.

tors of the goods and chattels of perſons dying inteſtate [u], and this continued to be the caſe till the ſtatute of the 31 Edw. III. before-mentioned [w] was made [x]. But now adminiſtrators are put upon the ſame footing with regard to ſuits, and to accounting, as executors appointed by will [y].—Where there be two adminiſtrators, and one dies, the adminiſtration ſurvives, and doth not ceaſe [z]: it not being like a letter of attorney to two, where by the death of one the authority ceaſeth; but is rather an office; and adminiſtrators are enabled to bring actions in their own names: they come in the place of executors, and therefore the office ſurvives [a]. But if there is but one adminiſtrator, and he dies, his executors are not adminiſtrators, but it behoves the ordinary to commit a new adminiſtration [b]. When an adminiſtrator hath judgment, and dies, his executors (as ſuch) may not ſue execution of the judgment; for none ſhall have execution of this judgment, but he who ſhall be ſubject to the payment of the debts of the firſt inteſtate [c].———If there be two or more adminiſtrators, one of them cannot ſell goods, or releaſe debts, without the others joining; for they have but one authority given them by the biſhop over the goods: which authority being given to many, is to be executed by all of them joined together [d]. But it is otherwiſe in reſpect to co-executors; theſe being in law but one perſon, therefore the act of one is the act of them all, and the poſſeſſion of one is accounted the poſſeſſion of all [e].

AN adminiſtrator, by virtue of his adminiſtration, hath intereſt in all the chattels, real and perſonal, of the inteſtate, and all the goods and chattels, either in poſſeſſion or action [f], in like manner as an executor in the goods of the teſtator deceaſed. And all thoſe goods and chattels which belonged

[u] Page 9.
[w] Page 2.
[x] Black. Com. 2 V. 495.
[y] *Ibid.* 496.
[z] Page 6.
[a] 2 Vern. 514.
[b] Page 6.
[c] 5 Co. Rep. 9.
[d] Lord Bacon's Tracts, 162. 1 Atk. 460.
[e] Swinb. 328.
[f] For the particulars of theſe, ſee p. 28.

to the inteſtate at the time of his death, and which came to the hands of the adminiſtrator, ſhall be *aſſets*, or ſufficient goods and chattels, to make him chargeable to creditors, as executors are to creditors and legatees. But before they come to his hands he is not chargeable[g], as we ſhall ſee more of hereafter[h].——An executor or adminiſtrator ſhall regularly charge others for any debt or duty due to the deceaſed, as the deceaſed himſelf might have done; and the ſame actions the deceaſed might have had, the ſame actions, for the moſt part, the executor or adminiſtrator may have alſo. But an executor or adminiſtrator ſhall not charge another, or have any action againſt him for a perſonal wrong done to the teſtator, when the wrong done to his perſon, or that which is his, is of that nature for which damages only are to be recovered: and therefore an executor or adminiſtrator cannot ſue another for beating or wounding of the deceaſed[i]. In actions merely perſonal, ariſing *ex delicto*, for wrongs actually done or committed by the defendant, as treſpaſs, battery, and ſlander, the rule is *actio perſonalis moritur cum perſona*, that a perſonal action dies with the perſon; and it never ſhall be revived, either by, or againſt the executors, or other repreſentatives. For neither the executors of the plaintiff have received, nor thoſe of the defendant have committed, in their own perſonal capacity, any manner of wrong or injury. But in actions ariſing *ex contractu*, by breach of promiſe and the like, where the right deſcends to the repreſentatives of the plaintiff, and thoſe of the defendant have aſſets to anſwer the demand, though the ſuits ſhall abate by the death of the parties, yet they may be revived againſt, or by the executors *or adminiſtrators*; being indeed rather actions againſt the property, than the perſon, in which the executors, *or adminiſtrators*,

g Wood's Inſt. new edit. 339.
h Page 46, 47.
i Shep. Touch. 459.

have

have now the ſame intereſt that the teſtator or inteſtate had before [k].

By the ſtatute of the 31 Edw. III. before-mentioned, adminiſtrators ſhall have an action to demand and recover, as executors, the debts due to the inteſtate. So if a man take from the executor or adminiſtrator the goods of the deceaſed; for this they muſt bring their action at common law; for they cannot ſue for the goods of the deceaſed in a court eccleſiaſtical [l]. And tenants may be ſued at the common law by executors or adminiſtrators for rent behind, and due to the teſtator or inteſtate in his lifetime, or at the time of his death; and they may for the ſame diſtrain the land charged with the rent [m].

By the ſtatute of the 32 Hen. VIII. c. 37. ſect. 1. after reciting, that by the order of the common law, the executors or adminiſtrators of tenants in fee-ſimple, tenants in fee-tail, and tenants for term of life, of rent-ſervices, rent-charges, rent-ſecks, and fee-farms, had no remedy to recover ſuch arrears of the ſaid rents or fee-farms as were due unto the teſtators, in their lives, nor yet the heirs of ſuch teſtator, nor any perſon having the reverſion of his eſtate after his deceaſe: it is enacted, that the executors or adminiſtrators of tenants in fee-ſimple, tenants in fee-tail, and tenants for term of life, of rent-ſervices, rent-charges, rent-ſecks, and fee-farms, unto whom any ſuch rent or fee-farm be due, ſhall have an action of debt for ſuch arrears againſt the tenants who ought to have paid in the life-time of their teſtator, or againſt their executors or adminiſtrators; or may diſtrain for the arrears on the land, or other hereditaments chargeable therewith, ſo long as the lands or

[k] Black. Com. 3 V. 302.
[l] Swinb. 18. 10 Mod. 21.
[m] Swinb. 18.

other hereditaments, continue in the ſeiſin or poſſeſſion of the tenant in demeſne; who ought immediately to have paid the rent or fee-farm, or the ſeiſin, or poſſeſſion of any other perſon claiming only from the ſame tenant by purchaſe, gift, or deſcent, in like manner as their teſtator might have done.

TENANTS in fee-ſimple, fee-tail, or for term of life, are thoſe who hold any meſſuages, lands, or tenements, in fee-ſimple, fee-tail, or for term of life [n]; and as they may hold any meſſuages, lands, or tenements, in this manner, ſo they may rent-ſervice, rent-charge, rent-ſeck, and fee-farm or fee-farm rent; which are called incorporeal hereditaments, as being a right iſſuing out of a thing corporate, though not the thing itſelf, but ſomething collateral thereto, which may be lands or houſes [o]. *Rent-ſervice* is ſo called, becauſe it hath ſome corporeal ſervice incident to it, as at the leaſt fealty, or the feodal oath of fidelity. For, if a tenant holds his land by fealty, and ten ſhillings rent; or by ſervice of plowing the lord's land, and five ſhillings rent; theſe pecuniary rents, being connected with perſonal ſervices, are therefore called rent-ſervice [p]. A *rent-charge* is where the owner of the rent hath no future intereſt, or reverſion expectant in the land; as where a man by deed maketh over to others his whole eſtate in fee-ſimple, with a certain rent payable thereout, and adds to the deed a covenant or clauſe of diſtreſs, that if the rent be *arrear*, or behind, it ſhall be lawful to diſtrain for the ſame. In this caſe the land is liable to diſtreſs, not of common right, but by virtue of the clauſe in the deed: and therefore it is called a *rent-charge*; becauſe in this manner the land is charged with a diſtreſs for the payment of it [q]. *Rent-ſeck, reditus ſiccus*, or barren rent, is in effect nothing more than a

[n] Black. Com. 2 V. 59.
[o] *Ibid.* 20.
[p] *Ibid.* 42.
[q] *Ibid.*

rent

rent reſerved by deed, but without any clauſe of diſtreſs[r]. A *fee-farm* rent is a rent-charge iſſuing out of an eſtate in fee; of at leaſt one-fourth of the value of the lands, at the time of the reſervation: for a grant of lands, reſerving ſo conſiderable a rent, is indeed only letting lands to farm in fee-ſimple, inſtead of the uſual methods for life or years[s].

THE word *demeſne*, or as it is ſometimes termed, *demeine*, or *demain*, is oft-times uſed for a diſtinction between thoſe lands that the lord of the manor hath in his own hands, or in the hands of his leſſee demiſed at a rack-rent, and ſuch other lands appertaining to the manor which belong to free or copy-holders. *But the tenant in demeſne* before mentioned, ſignifies the perſon ſeiſed or poſſeſſed of the inheritance.

BY ſect. 2. of the ſtatute laſt mentioned, it is provided, that the ſame ſhall not extend to any manor or lordſhip in Wales, whereof the inhabitants have uſed to pay to every lord or owner thereof, at his firſt entry into the ſame, any ſum for the redemption and diſcharge of all duties and penalties, wherewith the inhabitants were chargeable to any of the lord's anceſtors,

SECT. 3. If any man ſhall have, in right of his wife, any eſtate in fee-ſimple, fee-tail, or for term of life, in any rents or fee-farms, and the ſame be due and unpaid in the wife's life; the huſband, after the death of his wife, his executors and adminiſtrators, ſhall have action of debt for the arrears, or may diſtrain for the ſame, as he might have done if his wife had been living.

SECT. 4. If any perſon ſhall have any rents or fee-farms, for term of life of any other perſon, and the ſame be due and unpaid in the life of ſuch other perſon, and he die; he

[r] Black. Com. 2 V. 42.

[s] *Ibid.* 43. The learned author of the Notes on Co. Litt. ſays, the true meaning of fee-farm, is a perpetual farm or rent; the name being founded on the perpetuity of the rent or ſervice; not on the *quantum*. Co. Litt. 144. Note 5. 13 edit.

to

to whom the ſame was due, his executors or adminiſtrators, may have an action of debt againſt the tenant *in demeſne*, who ought to have paid the ſame, when it was firſt due, his executors and adminiſtrators; or may diſtrain for the ſame upon ſuch lands and tenements out of which the ſaid rents or fee-farms were iſſuing and payable; in like manner and form as he might have done, if ſuch perſon, by whoſe death the aforeſaid eſtate in the ſaid rents and fee-farms was determined and expired, had been in full life.

BY the ſtatute of the 11 Geo. II. c. 19. it being recited, that where any leſſor or landlord, having only an eſtate for life, in lands, tenements, or hereditaments demiſed; happened to die, before or on the day, on which any rent was reſerved or made payable; ſuch rent, or any part thereof, was not by law recoverable, by the executors or adminiſtrators of ſuch leſſor or landlord; nor was the perſon in reverſion intitled thereunto, any other than for the uſe and occupation of ſuch lands, tenements, or hereditaments, from the death of the tenant for life; of which advantage had been often taken by the under-tenants, who thereby avoided paying any thing for the ſame; and for remedy thereof, it is enacted, that where any tenant for life ſhall happen to die before, or on the day, on which any rent was reſerved or made payable, upon any demiſe or leaſe of any lands, tenements, or hereditaments, which determined on the death of ſuch tenant for life; that the executors or adminiſtrators of ſuch tenant for life, ſhall, in an action upon the caſe, recover of ſuch tenant or under-tenants of ſuch lands, tenements, or hereditaments; if ſuch tenant for life die on the day on which the ſame was made payable, the whole, or if before ſuch day, then a proportion of ſuch rent,

rent, according to the time ſuch tenant for life lived, of the laſt year or quarter of a year, or other time in which the ſaid rent was growing due, making all juſt allowances.

To the end that a due regard be had to creditors, by the ſtatute of the 22 & 23 Car. II. c. 10. called the ſtatute of diſtributions, as was mentioned in the ſecond ſection of the foregoing chapter; it is enacted, that no diſtribution of the goods of any perſon dying inteſtate be made, till after one year be fully expired after the inteſtate's death.—— An adminiſtrator, as well as an executor, is allowed, among debts of equal degree, to pay himſelf firſt, by retaining in his hands ſo much as his debt amounts to. So if a perſon indebted to another makes his creditor or debtee executor, or if ſuch creditor obtains letters of adminiſtration to his debtor, in theſe caſes the law gives him a remedy for his debt, by allowing him to retain ſo much as will pay himſelf, before any other creditors whoſe debts are of equal degree. This is a remedy by mere act of law, and grounded upon this reaſon; that the executor cannot, without an apparent abſurdity, commence a ſuit againſt himſelf, as repreſentative of the deceaſed, to recover that which is due to him in his own private capacity: but having the whole perſonal eſtate in his hands, ſo much as is ſufficient to anſwer his own demand is, by operation of law, applied to that particular purpoſe. Elſe by being made executor, he would be put in a worſe condition than all the reſt of the world beſides; for, as he can commence no ſuit, he muſt be paid the laſt of any, and of courſe muſt loſe his debt in caſe the eſtate of the teſtator ſhould prove inſolvent, unleſs he be allowed to retain it. But the executor ſhall not retain his own debt, in prejudice to thoſe of a higher degree; for the

the law only puts him in the ſame ſituation, as if he had ſued himſelf as executor, and recovered his debt; which he never could be ſuppoſed to have done, while debts of a higher nature ſubſiſted. Neither ſhall one executor be allowed to retain his own debt in prejudice to that of his co-executor in equal degree; but both ſhall be diſcharged in proportion [t].—The power the adminiſtrator has, in favouring and preferring creditors in the courſe of paying debts, will be ſeen hereafter [u]; together with ſome other powers he has veſted in him [w].

SECTION THE SECOND.

THE PARTICULARS OF WHAT THE ADMINISTRATOR IS INTERESTED IN, BY VIRTUE OF HIS ADMINISTRATION.

HAVING ſhewn, that the adminiſtrator, by virtue of his adminiſtration, hath intereſt in all the chattels, real and perſonal, of the inteſtate, and all the goods and chattels either in poſſeſſion or action [x]; we come now to conſider what theſe are in particular.

CHATTELS comprehend all goods, moveable and immoveable; except ſuch as are in the nature of freehold or parcel of it; and this word by the common law extends to all moveable and immoveable goods. But eſtates of inheritance [y], or freehold [z], cannot by the common law be

t Black. Com. 3 V. 18.

u Pag. 53, 54. 56, 57, 58.

w Pag. 43, 44.

x Pag. 21.

y For more particulars concerning eſtates of inheritance, ſee pag. 86.

z Eſtates of freehold are either of inheritance or not of inheritance, and theſe not of inheritance are but for life only. Eſtates of freehold, not of inheritance, may be created by deed or grant; as where a leaſe is made of lands or tenements to a man to hold for the term of his own life, or for that of any other perſon, or for more lives than one: in any of which caſes he is ſtiled tenant for life; only, when he holds the eſtate by the life of another, he is uſually called tenant *pur auter vie*. Black. Com. 2 V. 104. 120.—A leaſe for 99 years, determinable upon a life or lives, is not a leaſe for life to make a freehold; but a leaſe for years, or chattel determinable upon life or lives, and an eſtate for 1000 years, is not a freehold, or of ſo high a nature as an eſtate for life. Co. Litt. 46.

termed

termed goods and chattels. *Chattels* are either perſonal or real. *Perſonal*, as houſehold-ſtuff, goods and wares in a ſhop; carts, ploughs, horſes, oxen, ſheep, and the like: and theſe are called perſonal in two reſpects; one becauſe they belong immediately to the perſon of a man; the other, for that being any way injuriouſly with-held from him, he hath no other remedy to recover them but by perſonal action. *Chattels-real*, are ſuch as either appertain, not immediately to the perſon, but to ſome other thing by way of dependency; as a box with charters of land, or ſuch as are iſſuing out of ſome immoveable thing; as a leaſe, or rent for term of years: and chattels-real concern the reality, lands and tenements, intereſt in advowſons, in ſtatutes merchant, and the like[a]. But fiſhes in a pond, conies in a warren, deer in a park, pigeons in a dove-houſe, where the teſtator *or inteſtate* had the inheritance, or but for life, in the pond, warren, park, and dove-houſe; are not chattels at all, nor go to the executor *or adminiſtrator*; but to the heir with the inheritance: and therefore they are not to be put in the inventory of the goods and chattels of the party deceaſed. But if the teſtator *or inteſtate*, have any tame pigeons, deer, rabbits, pheaſants, or partridges, they ſhall go to the executors *or adminiſtrators*; and though they were not tame, yet if they were kept alive in any room, cage, or ſuch like place: ſo fiſh in a trunk; alſo young pigeons, though not tame, being in the dove-houſe, and not able to fly out[b]. Alſo hounds, greyhounds, ſpaniels, and the like, as they may be valuable, and may ſerve not only for delight, but for profit, ſhall go to the executors *or adminiſtrators*[c]. And they ſhall have all leaſes for years, though they may be for 1000 years[d], and all lands extended on any judgment, ſtatute, or recognizance, and all arrears of rent due at the death of the teſtator or inteſtate[e]. And all eſtates

[a] Co. Litt. 118.
[b] 4 Burn's Eccleſ. Law, 240.
[c] *Ibid.*
[d] Fitzh. Nat. Brev. 120.
[e] 4 Burn's Eccleſ. Law, 242. Law of Teſt. 341.

pur

pur auter vie, that is, eſtates held during the life of another, as before-mentioned. Theſe being diſtributable by the ſtatute of the 14 Geo. II. c. 20. ſhall, where a man dies inteſtate, and they were not made to him and his heirs, be diſtributed in the ſame manner as his perſonal eſtate; but it is otherwiſe if made to the inteſtate and his heirs. For which ſee more hereafter, p. 49.

CORN ſown will alſo go to the executor or adminiſtrator, and not to the heir, ſo alſo will hops, though not ſown, if planted, and ſaffron and hemp[f]. This being what is uſually ſtiled emblements, the doctrine of which extends not only to corn ſown, but to roots planted, or other annual artificial profit[g], as clover, ſaint-foin, and the like, which was ſown by the deceaſed[h]. But it is otherwiſe of fruit-trees, graſs, and the like; which are not planted annually at the expence and labour of the tenant, but are either the permanent, or natural profit of the earth[i]. So theſe latter go to the heir, and not to the executor or adminiſtrator. And Mr. Wentworth thinks, that roots in gardens, as carrots, parſnips, turnips, ſkirrets, and ſuch like (which he ſays may be of value in gardens about London, and ſome great towns), ſhall not go to the executor, but to the heir; becauſe they cannot be taken without digging and breaking the ſoil[k]. But it ſeems very clear by Lord Coke[l], and Sir William Blackſtone[m], that theſe ſhall go to the executor or adminiſtrator; and not to the heir.

IF a man ſeiſed for life, or in fee, or tail in his own right, or in the right of his wife, and ſows the ground with corn, but dies before it is ripe; his executors *or adminiſtrators* ſhall have it, and not the wife or heir: but graſs ready to be cut for hay, apples, pears, and other fruit on the trees, ſhall not go to the executors *or adminiſtrators*. And the reaſon of the dif-

f 4 Burn's Eccleſ. Law, 242.
g Black. Com. 2 V. 123.
h 4 Burn's Eccleſ. Law, 242.
i Black. Com. 2 V. 123.
k Went. Off. Exec. 62.
l Co. Litt. 55.
m Com. 2 V. 122.

ference is, becauſe the former comes not merely from the ſoil, without the induſtry or manurance of man, as the latter doth. And if the wife had a leaſe for years, as executrix, and the huſband ſows the ground with corn, and dies before it is ripe; the corn ſhall go to his executors *or adminiſtrators*, or at leaſt, ſo much as is more than the yearly rent of the land: but if the huſband and wife were joint-tenants of the land, ſhe ſhall have the corn and not his executors [n]. And if a parſon ſows his glebe land, and dies before ſeverance, and after his ſucceſſor is admitted, inſtituted, and inducted, before the corn is cut, it ſhall go to the executors or adminiſtrators of the deceaſed, who muſt pay tithes thereof to the ſucceſſor [o].

THINGS that are affixed to the tenement, and are made parcel of the freehold, belong to the heir, and not to the executor *or adminiſtrator*; as the glaſs annexed to the windows of the houſe, which is parcel of the houſe, and ſhall deſcend as parcel of the inheritance to the heir, and the executors *or adminiſtrators* ſhall not have it. And although the leſſee himſelf, at his own coſt, cauſe the glaſs to be put into the windows, yet the ſame being parcel of the houſe, he cannot take it away afterwards, without danger of puniſhment for waſte. Neither is there any material difference in law, whether the glaſs was annexed to the window with nails, or in any other manner, either by the lord or by the tenant; for being once affixed to the freehold, the ſame cannot be removed by the leſſee, but ſhall belong to the heir, and not to the executors *or adminiſtrators* [p]. So in reſpect of wainſcot, this being annexed unto the houſe, either by the leſſor or by the leſſee, is parcel of the houſe. And there is no difference whether it be affixed with great nails or little nails, or by ſcrews or irons thruſt through the poſts or walls of the houſe; for howſoever it be affixed, either in manner

[n] Law of Teſt. 342.
[o] 4 Burn's Eccleſ. Law, 243.
[p] Swin. 421.

aforeſaid,

aforeſaid, or in any other manner, it is parcel of the freehold; and if the executors or adminiſtrators ſhall remove it, they are puniſhable for the ſame [q]: and not only glaſs and wainſcot, but any other ſuch like thing affixed to the freehold, or to the ground, with mortar and ſtone; as tables dormant, leads, mangers, and ſuch like; theſe alſo belong to the heir, and not to the executor *or adminiſtrator* [r]. As do alſo millſtones, anvils, doors, keys, window-ſhutters; none of theſe being chattels, but parcel of the freehold, or thereto pertaining, ſhall not go to the executors [s] *or adminiſtrators*.

AN executor taking away a furnace which was ſet up in the middle of a houſe, and not fixed to any wall, the heir brought an action of treſpaſs againſt him, and it was adjudged for the heir, that this ſhould go as part of the freehold and inheritance of the heir. But in the caſe of *Day* and *Auſtin*, Walmſley ſaid, that Lord Dyer's opinion was, that where the furnace is not affixed to the wall, the leſſee might, within his term, take it away; but not if it was fixed to the wall, for there it would ſtrengthen the houſe [t].——Pictures and glaſſes, though, generally ſpeaking, not part of the freehold, yet if put up inſtead of wainſcot, or where otherwiſe wainſcot would have been put up, ſhall go to the heir; for the houſe ought not to come to the heir maimed or diſfigured [u]. But in the caſe of *Harvey* and *Harvey* M. 14 Geo. II. in trover by the executor againſt the heir, it was held by chief juſtice Lee, that hangings, tapeſtry, and iron backs to chimneys, belonged to the executor; who recovered accordingly againſt the heir. And the law ſeems now to be held not ſo ſtrict as formerly; and if theſe things can be taken away without prejudice to the fabric of the houſe, it ſeems that the executor *or adminiſtrator* ſhall have them; as

q Swinb. 421.
r *Ibid.*
s Went. Off. Exec. 61.
t Law of Teſt. 342.
u *Ibid.*

tables,

tables, although faſtened to the floor; furnaces, if not made part of the wall, grates, iron ovens, jacks, clock-caſes, and ſuch like, although fixed to the freehold by nails or otherwiſe [v].

IN the caſe of *Lawton* and *Lawton*, 1743, the queſtion was, whether a fire-engine, ſet up for the benefit of a colliery by a tenant for life, ſhall be conſidered as perſonal eſtate, and go to the executor; or fixed to the freehold, and to go to a remainder man [w]. For the plaintiff (who was a creditor of the tenant for life) evidence was read, to prove that the fire-engine was worth, to be ſold, 350l. and that it is cuſtomary to remove fire-engines. And it was urged, that the teſtator had died greatly in debt; and it would be hard, when he had been laying out his creditors money in erecting this engine, that they ſhould not have the benefit of it, but that the ſtrict rule of law ſhould take place. And it was compared to the caſe of a cyder mill, which is let in very deep into the ground and is certainly fixed to the freehold; and yet lord chief baron Comyns, at the aſſizes at Worceſter, upon an action of trover brought by an executor againſt the heir, was of opinion, that it was perſonal eſtate, and directed the jury to find for the executor. And lord chancellor Hardwicke, on the queſtion of the fire-engine, whether it ſhould be conſidered as perſonal eſtate, and conſequently applied to the increaſe of aſſets for payment of debts; ſays, it appears in evidence, that in its own nature it is a perſonal moveable chattel, taken either in part or in groſs before it is put up. But then it is inſiſted, that fixing it, in order to make it work, is properly an annexation to the freehold. In the old caſes they go a great way upon the annexation to the freehold; and ſo long ago as Henry the ſeventh's time, the courts of law conſtrued even a copper and furnaces to be part of the freehold. Since that

[v] 4 Burn's Eccleſ. Law, 244.

[w] A remainder man, is he who has the eſtate by virtue of ſome limitation, made either by will or deed. As if a man ſeiſed in fee ſimple, deviſeth or granteth lands to A for life, and after the determination of A's eſtate for life, limiteth it to B and his heirs for ever. Here A is tenant for life, and B a remainder man in fee.

time, the general grounds the courts have gone upon of relaxing this ſtrict conſtruction of law is, that it is for the benefit of the public, to encourage tenants for life to do what is advantageous to the eſtate during their term. What would have been held to be waſte in Henry the ſeventh's time, as removing wainſcot fixed only by ſcrews, and marble chimney-pieces, is now allowed to be done. Coppers, and all ſorts of brewing veſſels, cannot poſſibly be uſed, without being as much fixed as fire-engines; and in brew-houſes eſpecially, pipes muſt be laid through the walls, and ſupported by walls; and yet, notwithſtanding this, as they are laid for convenience of trade, landlords will not be allowed to retain them. The old rules of law have been relaxed chiefly between landlord and tenant, and not ſo frequently between an anceſtor and heir at law, or tenant for life and remainder man. But even in theſe caſes, it admits the conſideration of public conveniency for determining the queſtion; and after making ſome more obſervations on the caſe, lord Hardwicke ſays, Upon the whole, I think this fire-engine ought to be conſidered as part of the perſonal eſtate of Mr. Lawton, and go to the executor for increaſe of aſſets. And decreed accordingly[x].

THERE are ſome goods and perſonal chattels called heir-looms, which, contrary to the nature of chattels, ſhall go by ſpecial cuſtom to the heir along with the inheritance, and not to the executor *or adminiſtrator* of the laſt proprietor; and theſe are generally ſuch things as cannot be taken away without damaging or diſmembering the freehold[y]. ——If a man be ſeiſed of a houſe, and poſſeſſed of divers heir-looms, that by cuſtom have gone with the houſe from heir to heir; it ſeemeth that theſe, although no part of the freehold, ſhall go to the heir, and not to the executor[z]; and that if a man deviſeth theſe away by his will, this deviſe is void[a]. ——By ſpecial cuſtom in ſome places, carriages, utenſils, and other houſehold implements, may be heir-looms; but ſuch cuſtom

x 3 Atkyns, 13. 4 Burn's Eccleſ. Law, 244.

y Black. Com. 2 V. 427.

z 4 Burn's Eccleſ. Law, 247.

a Co. Litt. 185.

muſt be ſtrictly proved [b].——Other perſonal chattels there are, which deſcend to the heir in nature of heir-looms, as a monument or tombſtone in a church, or the coat-armour of his anceſtor there hung up, with the pennons and other enſigns of honour, ſuited to his degree. In this caſe, although the freehold of the church is in the parſon, and theſe are annexed to that freehold, yet cannot the parſon, or any other, take them away or deface them, without being liable to an action from the heir. Pews in the church are ſomewhat of the ſame nature, which may deſcend by cuſtom immemorial (without any eccleſiaſtical concurrence) from the anceſtor to the heir. But though the heir has a property in the monuments and eſcutcheons of his anceſtors, yet he has none in their bodies or aſhes; nor can he bring any civil action againſt ſuch as indecently at leaſt, if not impiouſly, violate and diſturb their remains, when dead and buried. The parſon, indeed, who has the freehold of the ſoil, may bring an action of treſpaſs againſt ſuch as dig or diſturb it: and if any one, in taking up a dead body, ſteals the ſhroud or other apparel, it will be felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral [c].

CHARTERS and deeds, court-rolls, and other evidences of the land, together with the cheſts in which they are contained, ſhall paſs together with the land to the heir, in the nature of heir-looms, and ſhall not go to the executor or adminiſtrator [d]. But as to the cheſts, *Rolle* makes a diſtinction, and ſaith, if the writings which concern the inheritance are in a cheſt, the executor ſhall have the cheſt, and the heir the writings. But if the cheſt be ſhut, the heir ſhall have the cheſt alſo; if it be not ſhut, the executor ſhall have the cheſt [e]. The author of the Law of Teſtaments obſerves, that this diſtinction ſeemeth not to be well

[b] Black. Com. 2 V. 428.
[c] *Ibid.*
[d] *Ibid.*
[e] 1 Roll's Abr. 915.

taken; for if it be a box intended for the keeping of the deeds, the heir ought to have it, whether locked or open: on the other hand, if it be a box deſigned for other uſe, as for keeping linen, it cannot be ſaid to be appurtenant to evidences, although ſome be in it, for ſo may other things alſo; or perhaps it may be a cheſt or cabinet of great value, ſurely this ſhall not go to the heir, when perhaps there is not perſonal eſtate ſufficient to pay the teſtator's debts [f].

BESIDES theſe things that are in the nature of heir-looms, there are ſome other goods and perſonal chattels that may not go to the executors or adminiſtrators; as, *paraphernalia*, which our law uſes to ſignify the apparel and ornaments of the wife, ſuitable to her rank and degree; and which ſhe becomes entitled to at the death of her huſband, over and above her jointure or dower, and preferable to all other repreſentatives: and the jewels of a peereſs uſually worn by her, have been held to be *paraphernalia*. And the huſband cannot by will deviſe from his wife ſuch ornaments and jewels; though during his life, perhaps, he hath the power (if unkindly inclined to exert it) to ſell them or give them away. But if ſhe continues in the uſe of them till his death, ſhe ſhall afterwards retain them againſt his executors and adminiſtrators, and all other perſons, except creditors, where there is a deficiency of aſſets. And her neceſſary apparel is protected even againſt the claim of creditors [g]. But ſhe ſhall not have exceſſive apparel; and if ſhe takes more than is convenient, ſhe ſhall be taken to be an executor of her own wrong. If the huſband delivers his wife a piece of ſilk to make a garment, and dies, although it was not made into a garment in the life of the huſband, yet the wife ſhall have it, and not the executors of the huſband; but againſt the debtee of the huſband, the wife ſhall have no more apparel

[f] Law of Teſt. 343.

[g] Black. Com. 2 V. 435.

than

than is convenient[h].—Where the queſtion to be decided was, whether *paraphernalia* ſhould be liable to the payment of ſimple contract creditors and legacies, lord Hardwicke ſaid, at law, where the huſband dies indebted, the widow cannot have her *paraphernalia*; but this court[i] does not determine ſo ſtrictly; for, if the perſonal eſtate hath been exhauſted in payment of ſpecialty creditors[k], ſhe ſhall ſtand in their place, as to ſo much of the real aſſets[l] of the heir at law; for ſhe has a prior right, and a ſuperior one to legatees, who take only by the bounty of the teſtator[m]. So likewiſe, if the huſband pledges the wife's *paraphernalia*, and dies, leaving a ſufficient eſtate to redeem the pledge, and pay all his debts, ſhe ſhall be entitled to have it redeemed out of the huſband's perſonal eſtate.—But the huſband may alienate the ſame in his lifetime[n]; that is, he may transfer the property to another. To alienate, or to alien, chiefly relates to lands or tenements, as to alien land in fee, is to ſell the fee-ſimple thereof.

SECTION THE THIRD.

OF MAKING AN INVENTORY.

THE executor or adminiſtrator is to make an inventory of all the goods and chattels, whether in poſſeſſion or action, of the deceaſed; which he is to deliver in to the ordinary upon oath, if thereunto lawfully required[o]. It is ſaid, that if an executor, without making an inventory, ſhall interfere in the adminiſtration of the goods of the deceaſed, except in certain caſes; ſuch as the funeral expences, the neceſſary preſervation of the goods, and the like, he ſhall be bound to anſwer to every one of his creditors his whole debt[p]; and that every legatary may recover

h 1 Roll's Abr. 911.
i The Court of Chancery.
k For what ſpecialty creditors are, ſee pag. 55.
l For what real aſſets are, ſee pag. 45.
m Caſe of Snelſon and Corbet, June 16, 1746. 3 Atk. 369.
n 3 Atk. 394.
o Black. Com. 2 V. 510.
p Swinb. 228.

his whole legacy at his hands: for in this caſe the law preſumeth, that there are ſufficient goods to pay all the legacies, and that the executor doth ſecretly and fraudulently ſubtract the ſame. Whereas otherwiſe the executor is preſumed not to have any more goods which were the teſtator's than are deſcribed in the inventory, the ſame being lawfully made[q]. And therefore if any creditor or legatary affirms, that the teſtator had any more goods than are compriſed in the inventory, he muſt prove the ſame: otherwiſe the judge is to give credit to the inventory, being made in the due form of law[r]. But as the time of exhibiting ſuch inventory is left to the diſcretion of the ordinary, he may remit the making of it for a reaſonable cauſe; as, where it may be expedient that the quantity of goods ſhould not be divulged[s].

BY the conſtitution of Othobon, the inventory ſhall be made in the preſence of ſome credible perſons, who ſhall competently underſtand the value of the goods belonging to the deceaſed; for it is not ſufficient to make an inventory, unleſs the goods therein contained are particularly valued and appraiſed by ſome honeſt and ſkilful perſons, according to their juſt value in their judgments and conſciences; being eſtimated according to ſuch price as the ſame might be ſold for at that time[t]. ——By the practice of the courts, if the goods of the deceaſed ſhall be appraiſed by any honeſt perſons in the neighbourhood, and reduced into an inventory, and afterwards the inventory ſhall in due time be exhibited, before the judge who proves the will or grants adminiſtration, upon the oath of the executor or adminiſtrator; ſuch inventory ſhall receive credit in all cauſes and courts; and he that exhibits it ſhall be freed from the burden of

q Swinb. 228.
r *Ibid.* 426.
s Lind. 176.
t Swinb. 425.

proving

proving the truth thereof, or that the teſtator had no more goods; but the legatee, or other perſons preferring claims, are to prove that goods have been omitted therein [u].

SOMETIMES when there is a conteſt, it is demanded, and by the judge decreed, at the inſtance of the party having intereſt in the goods of the deceaſed, that an inventory be exhibited upon the oath of the executor or adminiſtrator, before the iſſuing of the probate or letters of adminiſtration under ſeal; and then, notwithſtanding the former general oath [w] had been taken for the faithful adminiſtering the goods of the deceaſed, and for exhibiting a true inventory, a ſpecial oath hath been uſed to be taken, at the time of exhibiting the inventory, of the truth thereof, and that either perſonally or by virtue of a commiſſion. And ſometimes before the granting, or at leaſt before the iſſuing of the probate or letters of adminiſtration (inſtead of an inventory of the goods of the deceaſed upon the oath of the party), at the requeſt of ſome perſon having intereſt, the judge iſſueth a commiſſion for the appraiſement and true valuation of the goods, rights, and credits, and inſpection of the obligations, leaſes, and other writings and papers whatſoever, concerning the perſonal eſtate of the deceaſed, at the houſe of the deceaſed, or elſewhere, whereſoever his goods, rights, or credits remain or be, on ſuch a day or days, with continuation and prorogation of the time and place, as ſhall be needful. Alſo in theſe caſes, there uſually iſſues a monition againſt the other party in ſpecial, and all others in general, with whom any of the goods, rights, or credits of the deceaſed remain and be, that they exhibit or ſhew, or cauſe to be exhibited or ſhewn, really and with effect, to the appraiſers, by virtue of the com-

[u] 1 Oughton's Ordo Judiciorum, 344. [w] Pag. 13.

miſſion aforeſaid appointed, at the time and place of the execution thereof, the aforeſaid goods, rights, and credits of the deceaſed, and alſo the bonds, leaſes, and other writings and papers concerning the perſonal eſtate of the deceaſed, remaining or being with them, or any of them; to the end that they may be appraiſed and put in the inventory, on pain of law and contempt.—Such commiſſion being duly executed, the inventory is brought in and exhibited, ſigned by the hands of the commiſſioners or appraiſers, or two of them at the leaſt, without the oath of the party for the truth thereof. And alſo in ſuch caſes, an inventory is often required upon the oath of the executor or adminiſtrator, of ſuch goods of the deceaſed as have been already diſpoſed of[x].

AFTER the inventory is exhibited, a creditor ſhall not be admitted to object thereto in the eccleſiaſtical court; for the ſtatute[y] which requires the executors or adminiſtrators to make an inventory, only enjoins them to deliver it in upon oath into the keeping of the ordinary; and the ordinary, by the ſame ſtatute, is required to receive the ſame ſo preſented or tendered to be delivered.—The court of King's Bench being moved, to grant a prohibition to the eccleſiaſtical court, on behalf of Mrs. Catchſide an adminiſtratrix; ſhe having been cited into an inferior eccleſiaſtical court at the promotion of Ann Ovington, a creditor, to exhibit an inventory, which ſhe accordingly brought in, and the creditor objected to it, and obtained a decree. The adminiſtratrix then appealed to the ſuperior eccleſiaſtical court, which affirmed the decree. The ſuggeſtion on which the plea for a prohibition was built was, the want of juriſdiction of thoſe courts. The reply to which, on ſhewing cauſe, was, that it being after ſentence, it was now too late for a prohibition, unleſs it ſhould appear that they had determined contrary to law. But lord

[x] 1 Ought. 344, 5.

[y] 21 Hen. VIII. c. 5.

Mansfield

Mansfield and the court were of opinion, that from the face of the proceedings, it appeared that the ſpiritual court had no juriſdiction, and therefore the rule for a prohibition was made abſolute[z].

THE things that are to be put into the inventory, we may perceive by what has before been ſaid, concerning the particulars the adminiſtrator is intereſted in, by virtue of his adminiſtration[a].——Debts owing to the deceaſed, of which there is no writing or obligation, it is ſaid, ought not to be put into the inventory before they be received; becauſe before that they are not found to be debts, at leaſt ſo much as that they may be handled or taken hold of; but afterwards, when ſuch debts are received, they ought to be put into the inventory as goods newly accruing[b]. But unleſs they be bad debts, it ſeems beſt to inſert them; and even if they be bad debts, or deſperate, yet they may be inſerted, ſpecifying them as ſuch. And if in the courſe of adminiſtration they ſhall be recovered, then they ſhall be accounted for in like manner as the reſt of the perſonalty: and if they cannot be recovered, or ſo much of them as cannot be recovered, ſhall not be accounted for as any part of the goods of the deceaſed[c].——Debts, which the deceaſed owed to others, ſays Lindwood, ought not to be put in the inventory; becauſe they are not the goods of the deceaſed, but of other perſons. Yet they may be put in, if it ſhall ſeem expedient[d].——If the inventory ſhould never be required, yet the perſon who applies for an adminiſtration, ſhould obtain knowledge of the value of the deceaſed's goods, chattels, and credits; that he may be prepared to take the oath mentioned in the fourth ſection of the foregoing chapter.

BY the ſtatutes of the 5 W. & M. c. 20. and 9 W. c. 25. it is required, that the inventory be written or ingroſſed on paper or parchment, having a double ſix-

[z] Caſe of Catchſide and Ovington, T. 6 Geo. III. 1 Burr. Rep. 1922.
[a] Pag. 28—37.
[b] Lind. 176.
[c] 4 Burn's Eccleſ. Law, 241.
[d] Lind. 176.

penny

penny ſtamp; and by the ſtatute of the 23 Geo. III. c. 28. there is an additional duty of one ſhilling added thereto; ſo that now the inventory muſt be written or ingroſſed on paper or parchment, ſtamped with a two ſhilling ſtamp.—It may be made in the following form, with variations, according to the condition of the goods to be inventoried.

A true and perfect inventory of all the goods, chattels, wares, and merchandizes, as well moveable as not moveable, of A. B. late of C. in the county of , in the dioceſe of , yeoman, deceaſed, made by us whoſe names are hereunto ſubſcribed, the day of in the year of our Lord

	£.	s.	d.
His purſe and apparel,	15	0	0
Horſes and furniture,	20	0	0
Horned cattle,	27	0	0
Sheep,	20	0	0
Swine,	0	13	0
Poultry,	0	3	4
Plate, and other houſehold goods,	18	0	0
One leaſe of, &c.	30	0	0
Rent in arrear,	35	0	0
Corn growing at the time of his death,	12	0	0
Hay and Corn,	10	0	0
Ploughs, and other implements of huſbandry,	6	10	0
Debts,	100	0	0
Total,	294	6	4
Other debts ſuppoſed to be deſperate,	25	2	6

Debts owing by the deceaſed, 250l.

Appraiſed by us the day and year above written,

D. E.
F. G.

SECTION

SECTION THE FOURTH.

OF GETTING IN THE EFFECTS, AND WHAT SHALL BE ASSETS IN THE ADMINISTRATOR'S HANDS TO MAKE HIM CHARGEABLE.

FOR collecting the goods and chattels of the deceaſed, the executor or adminiſtrator has very large powers and intereſts conferred on him by the law, being the repreſentative of the deceaſed. And an executor or adminiſtrator may, after the death of the deceaſed, enter into the houſe where the deceaſed lived, and where he died, and where the goods are, and take them away, and juſtify it; but he muſt do it within convenient and reaſonable time, as within thirty days after his death, or thereabouts, and in a quiet and fair manner when the door is open [e]. — In the former part of this chapter we have ſeen, that adminiſtrators are put upon the ſame footing, with regard to ſuits, as executors appointed by will, and that they ſhall have actions to demand and recover, as executors, the debts due to the inteſtate. An adminiſtrator may have an action upon a judgment, ſtatute, recognizance, obligation, or other ſpecialty made to his inteſtate; or upon any covenant or contract; and he ſhall have an action of treſpaſs or trover for the goods of the inteſtate taken in his life; and an action for a treſpaſs with cattle in his cloſe [f]. And towards the beginning of this chapter we have ſeen, that for the moſt part the ſame actions the deceaſed might have had, the adminiſtrator ſhall have alſo; and that in actions ariſing by breach of promiſe and the like, where the right deſcends to the repreſentatives of the plaintiff, and thoſe of the defendant have aſſets to anſwer the demand, though the ſuits ſhall abate by the death of the parties, yet they may be revived againſt, or by the executors or adminiſtrators. Likewiſe we have ſeen, that adminiſtrators are empowered to diſtrain for rent in

[e] Shep. Touch. 453.

[f] Com. Dig. Adminiſtration (B. 13.)

arrear.

arrear.——Where any judgment after verdict ſhall be had, by or in the name of any executor or adminiſtrator; in ſuch caſe an adminiſtrator of goods not adminiſtered, may ſue forth a writ of *ſcire facias*, and take execution upon ſuch judgment [g].

IN all actions brought by executors or adminiſtrators, upon contracts, bonds, or other things made to the deceaſed, or for goods taken away in his life, they ſhall pay no coſts by any ſtatute [h]. Executors and adminiſtrators, when ſuing in the right of the deceaſed, ſhall pay no coſts: for the ſtatute 23 Hen. VIII. c. 15. doth not give coſts to defendants, unleſs where the action ſuppoſes the contract to be made with, or the wrong to be done to, the plaintiff himſelf [i]. And when an executor muſt declare as executor, he ſhall pay no coſts: but if the cauſe of action ariſes in the time of the executor, and is therefore a matter within his knowledge, and for which he may declare in his own right, and need not declare as executor, he ſhall be liable to pay coſts [k].—On a queſtion, whether an executor ſhould be permitted to diſcontinue, without payment of coſts. For the plaintiff executor, it was urged, that an executor ſhould not pay coſts in any inſtance excepting one, viz. where he had brought an action as executor, which he might have brought in his own name: but the court were of opinion, that the giving an executor leave to diſcontinue, was matter of diſcretion in the court; and they ought not to give him ſuch leave, in any caſe where he hath knowingly brought his action wrong, unleſs he will conſent to pay coſts [l]. On a judgment of *non proſequitur* [m], for the executor's wilful delay he ſhall pay coſts [n].

g Stat. 17 Car. II. c. 8.

h New Abr. tit. Coſts.

i Black. Com. 3 V. 400.

k Str. 682.

l Bur. Manſf. 1451.

m *Non proſequitur*, or, as it is uſually termed, *non pros*, is where any perſon commences an action and does not declare, either the term the writ is returnable, or before the end of the enſuing term; the defendant againſt whom the action is brought having appeared, may ſign a *non pros* at any time in the vacation of ſuch enſuing term, and not after. Attorney's Pract. Epit. 16. And the plaintiff for thus deſerting his complaint in not purſuing his action, ſhall not only pay coſts, but is liable to be amerced to the King. Black. Com. 3 V. 296.

n Bur. Manſf. 1584.

ASSETS

Assets are real, or perſonal; where a man has lands in fee-ſimple, and dies ſeiſed thereof, the lands which come to his heir are aſſets real; and where he dies poſſeſſed of any perſonal eſtate, the goods which come to the executors or *adminiſtrators* are aſſets perſonal. *Aſſets* are alſo divided into aſſets by deſcent and aſſets in hand. *Aſſets* by deſcent are where a perſon is bound in an obligation, and dies ſeiſed of lands which deſcend to the heir, and which lands ſhall be aſſets, and the heir ſhall be charged as far as the land to him deſcended will extend[o]. *Aſſets* in hand are where one dies indebted, and appoints executors, or dies inteſtate, and the executor or adminiſtrator hath ſufficient in goods or chattels, or other profits, to pay the debts, or ſome part thereof; this ſhall be ſaid to be aſſets in his hands, and for ſo much he ſhall be charged[p]. There is alſo another diviſion of aſſets, into *legal* and *equitable* aſſets: *legal aſſets* are ſuch as are liable by the courſe of law; *equitable aſſets* are ſuch as are only liable by the help of a court of equity[q]. As to real aſſets and aſſets by deſcent, which more immediately concern the heir, more will be ſaid hereafter[r]. We ſhall therefore proceed to conſider what are aſſets in the adminiſtrator's hands to make him chargeable.

ALL thoſe goods and chattels, actions and commodities, which belonged to the deceaſed in right of action or poſſeſſion as his own, and ſo continued to the time of his death, and which after his death the executor or adminiſtrator gets into his hands, as duly appertaining to him in right of his executorſhip and adminiſtration; and all ſuch things as come to the executor or adminiſtrator in lieu, or by reaſon of that, and nothing elſe, ſhall be ſaid to be aſſets in the hands of the executor or adminiſtrator, to make him chargeable to a creditor or legatee[s].

ASSETS in the hands of one of the executors ſhall be ſaid to be aſſets in the hands of all the executors; and aſſets in any part of the world ſhall be ſaid to be aſſets in every part of the

[o] Terms of the Law.
[p] Shep. Touch. 472.
[q] See pag. 59.
[r] Pag. 93, 94.
[s] Shep. Touch. 472.

world:

world: and therefore if that point be in iſſue, and it appear that there are aſſets in the hands of any one of the executors, or in any county or place whatſoever, the jury muſt find that there are aſſets [t]. And though a plantation be an inheritance, yet being in a foreign country, it is a chattel to pay debts, and a thing that is teſtamentary [u]. All goods and chattels, of what nature or kind ſoever that are valuable, as oxen, kine, corn, &c. ſhall be eſteemed aſſets. But ſuch things as are not valuable, as a preſentation to a church, and the like, ſhall not be accounted aſſets [w].

ALL the goods and chattels that come to the executor or adminiſtrator, in the right of their executorſhip or adminiſtration, and are by law given to them by virtue thereof, in the right of the deceaſed (as herein before particulariſed [x]), and which are in poſſeſſion, ſhall be eſteemed aſſets in his hands; and goods pledged to the deceaſed, and not redeemed, or the money wherewith they are redeemed ſhall be ſaid to be aſſets in the hands of the executor or adminiſtrator [y]. And all the goods and chattels in action or poſſibility at the time of the death of the deceaſed, that are afterwards recovered, and of which the executor or adminiſtrator hath obtained poſſeſſion; when they are ſo recovered, are eſteemed aſſets in his hands. But they are never accounted aſſets, until they are recovered and in poſſeſſion; therefore if there be debts owing to the deceaſed upon ſtatutes or obligations, or otherwiſe, theſe are never eſteemed aſſets in the hands of the executor or adminiſtrator, until they are recovered. So likewiſe though there be debt or damage, recovered by a judgment had by the deceaſed, until execution be made, this ſhall not be eſteemed aſſets in the hands of the executor or adminiſtrator. So if the executor bring an action of treſpaſs againſt another *de bonis aſportatis in vita teſtatoris*, for goods carried away in the life of the teſtator, and he have a judgment

[t] Shep. Touch. 472.
[u] 2 Vent. 358.
[w] Shep. Touch. 472.
[x] Pag. 28—37.
[y] Shep. Touch. 472.

for

for damages; in this caſe, until he hath recovered by execution, it ſhall not be eſteemed aſſets in his hands. And if the judgment be erroneous, and the execution avoidable; in this caſe, although it be recovered and gotten in poſſeſſion, yet it ſhall not be eſteemed aſſets. And therefore, if one ſue another, and recover againſt him as adminiſtrator of J. S. and after a teſtament made by J. S. is produced and proved, and thereby an executor is made; in this caſe the money recovered by the adminiſtrator ſhall not be ſaid to be aſſets in his hands as to any of the creditors; becauſe the executor may recover it from him, or the debtor will have it again. And if the executor or adminiſtrator never recover, or get the thing into his poſſeſſion, he ſhall never be charged, eſpecially where he has done his beſt to get it, and cannot.

IF one covenant to make a leaſe for years to the deceaſed, his executors or adminiſtrators, and after his death the leaſe is made to the executor or adminiſtrator accordingly; in this caſe, this leaſe ſhall be ſaid to be aſſets in his hands, and he ſhall be chargeable for ſo much to any creditor [z]. And if an executor renew, he ſhall account for the new leaſe as well as the old, for the benefit of the creditors [a]. And whatſoever the executor or adminiſtrator muſt be forced to ſue for by the name of executor or adminiſtrator, being recovered, ſhall be eſteemed aſſets in his hands [b]. And if an executor recovers (as executor) things in chancery by equity, theſe things recovered ſhall be aſſets [c].

ALTHOUGH the thing be extinct, and gone as to the executor and adminiſtrator himſelf, yet it may have its being, and be accounted aſſets as to creditors and legatees. And therefore, if an executor or adminiſtrator have a leaſe for years of land, in the right of the deceaſed, and afterwards he purchaſes the fee-ſimple of the land (whereby the leaſe is drowned), yet in this caſe the leaſe ſhall continue to be aſſets as to creditors and legatees [d]. And if an executor ſurrenders a term of years which he had as executor to him in reverſion, it is not extinct as to him, but ſhall ſtill remain aſſets in the executor to ſatisfy debts and legacies [e]. And if the debtee make the debtor his executor, or the debtee die inteſtate, and the adminiſtration is committed to the debtor;

[z] Shep. Touch. 473.
[a] 2 Cha. Ca. 208.
[b] Shep. Touch. 473.
[c] 1 Roll's Abr. 920.
[d] Shep. Touch. 473.
[e] 1 Co. Rep. 87.

in

in theſe caſes the debt ſhall be ſaid to continue, and ſhall be eſteemed aſſets for ſo much as to other creditors [f]. Yet, if there be ſufficient aſſets to pay the teſtator's debts, the debtor being made executor, is thereby diſcharged of the debt [g].

THE goods and chattels of other men in the hands of the executor or adminiſtrator, that were in the poſſeſſion of the deceaſed, if he had no right to them, or if he had, and they do not belong to the executor, will not make the executor or adminiſtrator chargeable; for theſe ſhall not be eſteemed aſſets in his hands. And therefore, if the goods of another man be amongſt the goods of the deceaſed, and theſe come together into the hands of the executor or adminiſtrator; theſe goods that are the goods of another ſhall not be ſaid to be aſſets in the hands of the executor or adminiſtrator. And if the executor receive a rent that belongs to the heir, this rent ſhall not be ſaid to be aſſets in his hands: and hence it is, that if the deceaſed were outlawed at the time of his death, his goods and chattels are not to be accounted aſſets, for they are none of his [h].

A releaſe of a certain debt due to the teſtator makes it aſſets in the executors hands; becauſe it ſhall be intended he would not have made the releaſe unleſs the money had been paid to him [i]. And if an executor puts in ſuit a bond of 100l. for performance of covenants, and the parties ſubmit to an award, and it is awarded that the obligor ſhall pay 70l. in full ſatisfaction, and that the executor ſhall releaſe, which is done accordingly; it ſeems, that the executor ſhall be taken to have aſſets to the value of the whole 100l. for though by the award he was compelled to releaſe, it was his own act to ſubmit to the arbitrament [k].

IF a man hath a leaſe for years worth 20l. *per annum* at the rent of 5l. and he die; in this caſe not the whole value of the land, but ſo much as is above the rent, ſhall be ſaid to be aſſets in the hands of the executor or adminiſtrator [l]. As where an executor has a leaſe for years of the value of

f Shep. Touch. 474.
g Black. Com. 2 V. 512.
h Shep. Touch. 474.
i 1 Nelſ. Abr. 262.
k 3 Leon. 53.
l Shep. Touch. 474.

20l.

20l. a year, rendering rent of 10l. a year; it is aſſets in his hands only for 10l. over and above the rent[m].—By the ſtatute of the 14 Geo. II. c. 20. before-mentioned[n], it is enacted, that eſtates *pur auter vie*, in caſe there be no ſpecial occupant[o] thereof, of which no deviſe ſhall have been made according to the ſtatute of the 29 Car. II. c. 3. or ſo much thereof as ſhall not have been ſo deviſed, ſhall go and be applied and diſtributed in the ſame manner as the perſonal eſtate of the teſtator or inteſtate. And by this ſtatute of Car. II. an eſtate *pur auter vie* ſhall be aſſets in the hands of the heir, if he has it as ſpecial occupant.

IF there is a mortgage for years (whatever be the number), this is aſſets at law; becauſe the whole intereſt is not gone from the mortgagor, the reverſion in fee being left in him: but if it is a mortgage in fee, it is only aſſets in equity, becauſe the legal eſtate is gone out of the mortgagor[p]. If the heir of the mortgagee forecloſes the mortgagor, yet the land ſhall go to the executor, unleſs the heir pays him the mortgage money; and then he may have the benefit of the mortgage[q]. When upon a mortgage, money is made payable to the heir or executor, in that caſe, before or at the day of payment, the mortgagor hath election to pay it to either; but after the day of payment is paſt, and the mortgage forfeited by law, though equity doth give the mortgagor relief, ſo as upon the payment of the money, he ſhall have his land, yet equity will not revive the election of the mortgagor to pay it to the heir or executor; but then he ſhall be forced to pay it to the executor; becauſe it came out of the perſonal eſtate of the teſtator, and thither it ſhall return. But if in the mortgage neither heir nor executor is mentioned, then, after the death of the mortgagee, the law determines it to be paid to the executor[r].

THE intereſt which a maſter hath in a ſervant is not aſſets in the hands of an executor; for a ſervant whoſe maſter is dead, is legally diſcharged, and is not ſervant either to the heir or executor[s]. But the intereſt which one hath in an appren-

[m] Cro. Eliz. 712.

[n] Pag. 30.

[o] *A ſpecial occupant* is, where an eſtate for life is made to a man and his heirs; in ſuch caſe the heir ſhall have the eſtate, after the deceaſe of his anceſtor, as ſpecial *occupant*, or as a perſon particularly deſcribed, to whom the eſtate ſhall go after the leſſee's death. 4 Burn's Eccleſ. Law, 60.

[p] *Ibid.* 276.

[q] 2 Vern. 67.

[r] 2 Freem. 20.

[s] Went. 55.

tice, is a chattel perſonal, and ſhall go to the executors[t], of which we ſhall ſee more hereafter[u]. Alſo the intereſt in the liberty of a priſoner in execution for debt, is a chattel perſonal, and ſhall go to the executors[w].

HAVING ſeen, in the former part of this ſection, that the adminiſtrator has very large powers conferred on him by the law, here we may obſerve, that all acts done by him, as long as the adminiſtration continues in force, are good, and even though it be afterwards revoked or repealed. But there is a difference taken (6 Co. 18.) when an adminiſtration is repealed upon a citation, or upon an appeal. If it is upon an appeal, which ſuſpends the adminiſtration, all acts after ſuch ſuſpenſion are void: if it is repealed upon a citation, all the acts of the adminiſtrator, till the repeal, are good; for by the citation the grant of the adminiſtration is not ſuſpended; therefore, if the adminiſtration be repealed, all acts done by an adminiſtrator, which a rightful adminiſtrator might have done, ſhall be allowed; for in them he acted in the place of a rightful adminiſtrator[x]. But if there is any fraud, a creditor may have relief upon the ſtatute of the 13 Eliz. c. 5.[y]——As it hath often been the caſe to the defrauding of creditors, that ſuch perſons who were to have the adminiſtration of the goods of others dying inteſtate committed unto them, if they required it, would not accept the ſame, but ſuffered or procured the adminiſtration to be granted to ſome ſtranger of mean eſtate, and not of kin to the inteſtate; from whom themſelves, or others by their means, took deeds of gift, and authorities by letters of attorney, whereby they obtained the ſtate of the inteſtate into their hands, and yet ſtood not ſubject to any debts by him owing; it is enacted by the ſtatute of the 43 Eliz. c. 8. That every perſon who ſhall obtain any goods or debts of any perſon dying inteſtate, upon any fraud as is abovementioned, or without ſuch valuable conſiderations as ſhall amount to the value of the ſame goods or debts, or thereabouts (except it be in ſatisfaction of ſome juſt and principal debt of the value of the ſame goods or debts to him owing by

t Went. 55.
u Pag. 58.
w Law. of Teſt. 342.
x Comyns, 150.
y 6 Co. Rep. 19.

the inteſtate), ſhall be charged as executor of his own wrong, ſo far as ſuch goods and debts will ſatisfy.

IF a ſtranger takes upon him to act as executor, without any juſt authority (as by intermeddling with the goods of the deceaſed, and many other tranſactions), he is called in law executor of his own wrong, *de ſon tort*, and is liable to all the trouble of an executorſhip, without any of the profits or advantages: but merely doing acts of neceſſity or humanity, as locking up the goods, or burying the corpſe of the deceaſed, will not amount to ſuch an intermeddling, as will charge a man as executor of his own wrong. Such an one cannot bring an action himſelf in right of the deceaſed, but actions may be brought againſt him. He is chargeable with the debts of the deceaſed ſo far as aſſets come to his hands; and, as againſt creditors in general, ſhall be allowed all payments made to any other creditor in the ſame or a ſuperior degree, himſelf only excepted. And though, as againſt the rightful executor or adminiſtrator, he cannot plead ſuch payment, yet it ſhall be allowed him in mitigation of damages; unleſs, perhaps, upon a deficiency of aſſets, whereby the rightful executor may be prevented from ſatisfying his own debt [z]. ——As the executor of his own wrong is liable to the ſuit of the rightful executor, creditors, or legatees; ſo alſo, in caſe of his death, are his executors or adminiſtrators liable, by the ſtatute of the 30 Car. II. c. 7. although in other caſes a perſonal wrong dies with him that did it [a].

SECTION THE FIFTH.

THE ADMINISTRATOR'S OFFICE AND DUTY IN PAYING DEBTS.

IN payment of debts the executor or adminiſtrator muſt obſerve the rules of priority; otherwiſe, on deficiency of aſſets, if he pays thoſe of lower degree firſt, he muſt anſwer thoſe of a higher out of his own eſtate [b]. And as to debts of equal degree, he may, as we have before ſeen, retain what is due to himſelf [c].

FIRST, The executor or adminiſtrator may pay all funeral charges, and the expence of taking the letters of adminiſtration [d]. But as to funeral charges it is ſaid, that in ſtrictneſs,

[z] Black. Com. 2 V. 507.
[a] 4 Burn's Eccleſ. Law, 191.
[b] Black. Com. 2 V. 511.
[c] Pag. 27.
[d] Black. Com. 2 V. 511.

no funeral expences are allowed againſt a creditor, except for the coffin, ringing the bell, parſon, clerk, and bearers fees; and not for pall or ornaments [e]. And in general it is ſaid, that no more than forty ſhillings for funeral expences ſhall be allowed againſt creditors [f].

SECONDLY, Debts due to the King on record or ſpecialty, are to be paid [g]. But this muſt be underſtood of ſuch debts as are due to the King only by matter of record or ſpecialty, and not of ſums of money due to the King upon wood ſales, or ſales of his minerals, for which no obligation is given; or for amercements in his courts baron or courts of his honours, which be not courts of record; or for fines of copyhold eſtates there; or of forfeitures to the crown of debts by contract due to any ſubject by outlawry or attainder, until office thereupon found [h].

THIRDLY, Such debts are to be paid, as are by particular ſtatutes to be preferred to all others; as by ſtatute 30 Car. II. c. 3. are the forfeitures for not burying in woollen; and by ſtatute 17 Geo. II. c. 38. is the money due from overſeers on poors rates; and by ſtatute 9 Ann. c. 10. the money due for letters at the poſt-office [i]. As to the forfeitures for not burying in woollen, theſe by the ſtatute 30 Car. II. c. 3. ſect. 4. ſhall be paid out of the eſtate of the perſon deceaſed, before any ſtatute, judgment, debt, legacy, or other duty whatſoever. And as to money due from overſeers, by the ſtatute of 17 Geo. II. c. 38. ſect. 3. if any overſeer of the poor ſhall die, his executors or adminiſtrators ſhall, within forty days after his deceaſe, pay out of the aſſets all money remaining due, which he received by virtue of his office, before any of his other debts are paid. And as to money due for letters to the poſt-office, by the ſtatute 9 Ann. c. 10. ſect. 30. this ſhall be preferable in payment before any debt due to any private perſon.

FOURTHLY, Debts of record are to be paid, as judgments (docketted according to the ſtatutes 4 & 5 W. & M. c. 20.), ſtatutes and recognizances.—A debt of record is a ſum of money which appears to be due by the evidence of a court of record; as, when any ſpecific ſum is adjudged to be due from the defendant to the plaintiff, on an action or ſuit at law. This is a contract of the higheſt nature, being eſtabliſhed by the ſentence of a court of judicature.

[e] 1 Salk. 196.
[f] 3 Atk. 249.
[g] Black. Com. 2 V. 511.
[h] 2 New Abr. 432. Com. Dig. Adminiſtration (C).
[i] Black. Com. 2. V. 511.

cature. Recognizances alſo are a ſum of money recognized or acknowledged to be due to the crown or a ſubject, in the preſence of ſome court or magiſtrate, with a condition that ſuch acknowledgment ſhall be void upon the appearance of the party, his good behaviour, or the like: and theſe, together with the ſtatutes merchant and ſtaple, &c. if forfeited by non-performance of the condition, are alſo ranked among the laſt principal claſs of debts, viz. debts of record; ſince the contract on which they are founded is witneſſed by the higheſt kind of evidence, viz. by matter of record [k].—As to judgments, they are not only thoſe had againſt the deceaſed in his lifetime, but alſo debts upon judgments (although by mere confeſſion, and without defence), had againſt the executors or adminiſtrators for the debts of the deceaſed [l]. And of two judgments, he who firſt ſues execution muſt be preferred; but before, it is at the election of the executor or adminiſtrator to pay which he pleaſes firſt [m]. It is not neceſſary, that the judgment be limited to the courts at Weſtminſter; but if it be obtained in any court of record, which hath power to hold plea by charter or preſcription of debt above 40s. it is ſufficient. For though upon ſuch a judgment execution cannot there be had, but of ſuch goods as are within the juriſdiction of that court; yet, if the record be removed into chancery by a *certiorari*, and there by *mittimus* into one of the benches, then execution may be had upon any goods in any county of England [n]. But a judgment not docketted, according to the ſtatutes 4 & 5 W. & M. c. 20. ſhall not affect any lands as to purchaſers or mortgagees; or have any preference againſt heirs, executors, or adminiſtrators, in the adminiſtration of the eſtates of their anceſtors, teſtators or inteſtates. Which ſtatutes, in order to render more eaſy the finding of ſuch judgment entered, direct in what manner alphabetical liſts ſhall be made of judgments by confeſſion, *non ſum informatus*, or *nihil dicit*, in any of the courts of record at Weſtminſter; to the reſpective offices of which any perſon may reſort and ſearch, on paying 4d. for every term's ſearch.

[k] Black. Com. 2 V. 465. 511.
[l] Law of Exec. 39.
[m] Treat. of Eq. 112.
[n] Swinb. 456.

IT was decreed in the exchequer, that creditors by judgment at law, and creditors by decree in equity, ſhall be paid equally without any preference [o]. And it is now become the eſtabliſhed doctrine, that a decree of the court of chancery is equal to a judgment in a court of law; and where an executrix, whoſe teſtator was greatly indebted to divers perſons, in debts of different natures, being ſued in chancery by ſome of them, appeared and anſwered immediately, admitting their demands (ſome of the plaintiffs being her own daughters); other of the creditors ſued the executrix at law, where the decree not being pleadable, they obtained judgments; yet the decree of the court of chancery, being for a juſt debt, and having real priority in point of time, not by fiction and relation to the firſt day of term, was preferred in the order of payment to the judgments, and the executrix protected and indemnified in paying a due obedience to ſuch decree, and all proceedings againſt her at law ſtayed by injunction. This being firſt decreed by the maſter of the rolls, was affirmed by lord Talbot, and his lordſhip's decree was affirmed in parliament [p]. —— As to ſtatutes, and recognizances, before mentioned, theſe ſtanding in equal degree, it is at the adminiſtrator's election, to give precedency to which he pleaſes [q]. But thoſe which are forfeited ſhall be preferred before thoſe which are for the performance of covenants not broken [r]. And neither between one ſtatute and another, doth the time of antiquity give any advantage as touching the goods of the conuſor, but he who firſt ſeiſeth them by execution is preferred; and before ſuing of execution, the executor may give precedency to either [s].

MORTGAGES may alſo be reckoned among this laſt mentioned claſs of debts; for where a man mortgages land, and covenants to pay the money, and dies, the perſonal eſtate of the mortgagor ſhall, in favour of the heir, be applied to exonerate the mortgage [t]. And though there be no covenant in the deed for the payment of the mortgage money, yet the perſonal eſtate ſhall be liable in the hands of the executor [u]. A mortgage is a charge upon the perſonal eſtate, as well as upon the lands mortgaged; and the perſonal eſtate is primarily liable: for a mortgage is a general debt, and the land is only

o Bunb. 48.
p In May 1737. 3 P. Will. 402. Caſ. Talb. 217.
q 3 New Abr. 434.
r Swinb. 457.
s *Ibid.*
t 2 Salk. 449.
u *Ibid.* 1 Vern. 436.

as

as ſecurity [w]. It was decreed at the rolls, that mortgages were to be paid before judgments and recognizances: but upon an appeal to the houſe of lords, it was adjudged, that mortgages are not to be preferred to other real incumbrances; but that mortgages, ſtatutes, and recognizances, ſhall take place according to their priority, and as they ſtand in order of time [x].

FIFTHLY, Debts by ſpecialty or ſpecial contract are to be paid. When a ſum of money becomes, or is acknowledged to be due, by deed or ſpecial inſtrument under ſeal; ſuch as by deed of covenant, by deed of ſale, by leaſe reſerving rent, or by bond or obligation; it is conſidered as a debt by ſpecialty; and ſuch debts are looked upon as the next claſs after thoſe of record, being confirmed by ſpecial evidence under ſeal [y]. And rent arrear, and unpaid by the inteſtate, is equal to a debt by ſpecialty; for this favouring of the realty, the adminiſtrator can no more wage his law [z] againſt ſuch a debt, than he can to a debt by ſpecialty [a]. Where an action of debt was brought againſt an executor, for rent reſerved on a parol leaſe, after the leaſe was determined, and the executor pleaded that the teſtator entered into an obligation, and that he had not aſſets above 5l. which were not ſufficient to diſcharge this obligation; on demurrer it was reſolved, that this rent, though reſerved on a parol leaſe, was yet equal to an obligation, and that it ſtill remained in the realty, though the term was determined [b].

[w] 1 Atk. 487.

[x] Caſe of the Earl of Briſtol and Hungerford. T. 1705. 2 Vern. 524.

[y] Black. Com. 2 V. 465, 511.

[z] *To wage law* is, where the defendant ſwears, that he does not owe the plaintiff any thing. This was more common formerly than it is now. It is now only in actions of debt upon ſimple contract, or for amercement, in actions of detinue, and of account, where the debt may have been paid, the goods reſtored, and the account balanced without any evidence of either, that the defendant is admitted to wage his law; and not where there is any ſpecialty by bond or deed. And as the defendant is only allowed to wage his law in an action of debt; at preſent, one ſhall hardly hear of an action of debt brought upon a ſimple contract, that being ſupplied by an action of treſpaſs on the caſe, for the breach of a promiſe or aſſumpſit; and this being an action of treſpaſs, no law can be waged therein. So that wager of law is now quite out of uſe, being avoided by the mode of bringing the action, but ſtill it is not out of force. And therefore, when a new ſtatute inflicts a penalty, and gives an action of debt for recovering it, it is uſual to add, In which no wager of law ſhall be allowed. Black. Com. 3 V. 341.

[a] 2 New. Abr. 434.

[b] *Ibid.*

As to a bond, any voluntary bond is good againſt an executor or adminiſtrator, unleſs ſome creditor be thereby deprived of his debt: but if the bond be merely voluntary, a real debt (though by ſimple contract only) ſhall have the preference. But if there be no debt at all, then a bond, however voluntary, muſt be paid by an executor[c]. And although the executors are not named in an obligation, yet the law will charge them, for that they repreſent the eſtate of the teſtator. And the law is the ſame of adminiſtrators. But the heir ſhall not at any time be charged without expreſs mention of the heir[d].

BEFORE we proceed to conſider the laſt ſpecies of debts, viz. debts by ſimple contract, we may here make ſome obſervations on what has been ſaid concerning debts of record, and debts by ſpecialty, and ſpecial contract. As to debts of record, we may obſerve, that the executor ought to take notice of theſe at his peril[e]. But as to debts due by bond, or other ſpecialties, although the law requires, that debts ſhall be paid according to their ſuperiority, as herein ſet forth; yet, an executor may pay a debt on a ſimple contract before a ſpecialty, if he hath no notice of ſuch ſpecialty; for otherwiſe it might be in the power of the obligee to ruin the executor by keeping his bond in his pocket, until the executor ſhall have paid away all the aſſets, in diſcharging ſimple contract debts[f]. Reſpecting obligations, if there be divers of the like kind, it ſeemeth to be in the power of the executor to diſcharge which obligation, and to gratify which of the creditors he thinks fit: (in like manner as was before ſaid reſpecting debts of record[g]), which being done, the other creditors are without remedy, if there be no aſſets; unleſs the day of payment in the one obligation is expired, and the day of payment in the other obligation is not yet come; in which caſe, the former obligation is to be firſt ſatisfied; or unleſs there be ſuit commenced for ſome obligation, for then it is not in the power of the executor to diſcharge another obligation for which no

[c] 3 P. Will. 222. Comyns, 255.
[d] Dyer, 23.
[e] 2 New. Abr. 435.
[f] 2 New Abr. 435.
[g] Pag. 54.

action

action is brought, in prejudice of the former ſuit. But an executor may confeſs judgment on one obligation, and plead that judgment to an action brought on another obligation. And if there be two obligations, and the two ſeveral creditors bring ſeveral actions againſt the executor, he that firſt obtains judgment muſt be firſt ſatisfied [h].

DEBTS upon judgments, recognizances, mortgages, bonds, and other like ſpecialties, ſhall carry intereſt: ſo intereſt hath alſo been allowed upon demands due by covenant, although it was objected that they were not liquidated, and only found in damages [i].——Intereſt of an annuity being decreed by the lord chancellor from the very day it became due, Mr. Peer Williams adds a query as to this, and ſays, it ſeems the arrears ſhould carry intereſt only from the firſt day of payment next after the arrears of the annuity became due; if payable half yearly, then from the next half-year day; if quarterly, then from the next quarter-day; and ſo has been the common rule in theſe caſes [k].——Where a man prays ſatisfaction for a ſimple contract debt, merely out of perſonal aſſets, a court of equity will of courſe direct the debt to be paid with intereſt, to be computed from one year after the teſtator's death [l].

DEBTS by ſimple contract, which are the laſt ſpecies of debts to be paid, are ſuch where the contract upon the obligation ariſes, is neither aſcertained by matter of record, nor yet by deed or ſpecial inſtrument, but by mere oral evidence, the moſt ſimple of any; or by notes unſealed, which are capable of more eaſy proof, and therefore are only better than a verbal promiſe; and this laſt ſpecies of debts may be branched out into a variety of obligations through the numerous contracts for money, which are not only expreſſed by the parties, but virtually implied in law [m]. Debts by ſimple contract, though poſtponed to all others, an executor, *or adminiſtrator* is bound to pay, as far as he hath aſſets [n]. Yet if

[h] 2 New Abr. 434. Swinb. 457, 458.
[i] 14 Vin. Abr. tit. Intereſt.
[k] 1 P. Will. 541.
[l] Barnard. 229.
[m] Black. Com. 2 V. 466, 511.
[n] 2 New Abr. 434.

no

no ſuit is commenced againſt him, he may pay one creditor in equal degree his whole debt, though he has nothing left for the reſt: for without a ſuit commenced, the executor has no legal notice of the debt [o]. And no action ſhall be brought whereby to charge an executor or adminiſtrator, upon any ſpecial promiſe, to anſwer damages out of his own eſtate; unleſs the agreement upon which ſuch action ſhall be brought, or ſome memorandum or note thereof ſhall be in writing, and ſigned by the party to be charged therewith, or ſome other perſon thereunto by him lawfully authorized [p].

As to the intereſt a man hath in an apprentice, which, as we have ſeen, is a perſonal chattel, and will go the executor [q]; it was held by Holt, chief juſtice, that by the cuſtom of London, the executor of the maſter ſhould put the apprentice to another maſter of the ſame trade; and that in other places, it would be very hard to conſtrue the death of the maſter to be a diſcharge of the covenants; though he admitted that the covenant for inſtruction had been conſidered as cancelled, but that he ſtill continued an apprentice with the executor as to maintenance [r]. And where an action was brought againſt the executor, upon the covenant of the teſtator to teach an apprentice his trade; and after verdict for the plaintiff, it was moved, in arreſt of judgment, that this covenant was perſonal to the teſtator, and did not oblige the executors, but only obliged the maſter during his life to teach the apprentice; the court was of opinion, that it obliged the executors alſo, and that they ought to ſee the apprentice taught his trade; and if they were not of the trade, they ought to aſſign him to another that is of the trade, ſo that he may be taught according to the covenant; and judgment was given for the plaintiff [s]. And where a maſter received with an apprentice 250l. and died within two years, the apprentice during that time having been employed only in inferior affairs; it was decreed, after debts on ſpecialties

[o] Black Com. 2 V. 512.
[p] Stat. 29 Car. II. c. 3. ſect. 4.
[q] Pag. 50.
[r] 1 Salk. 66.
[s] Caſe of Walker and Hall. T. 27 C. II. 1 Lev. 177.

were

were paid, that the executors ſhould repay 250 l. as a debt due on ſimple contract, deducting after the rate of 20 l. a year for the maintenance of the apprentice, during the time he lived with his maſter [t].

IN reſpect to legal and equitable aſſets; if a man poſſeſſed of a term for years, mortgages it, and dies, leaving debts, ſome by bond, and ſome by ſimple contract, the equity of redemption is equitable aſſets, and ſhall be liable to all the debts equally [u].——A leaſe for years, or a bond, or grant of an annuity taken in a truſtee's name, being perſonal aſſets, ſhall be applied in courſe of adminiſtration [w]; that is, as has been ſhewn. The diſtinction ſeems to be this: where there are legal aſſets, that is, aſſets which are liable at law without the help of equity, there the executor may apply them, according to the courſe of law, which allows and requires a preference to be made as hath been mentioned; but where there are only equitable aſſets, that is, aſſets which are not liable, without the help of a court of equity, in ſuch caſe, the court will direct the application thereof, according to that courſe which ſeems moſt equitable and juſt, that is, to pay every creditor his ſhare in proportion [x]. So where the aſſets are partly legal, and partly equitable, although equity cannot take away the legal preference on legal aſſets, yet where one creditor has been partly paid out of ſuch legal aſſets, when ſatisfaction comes to be made out of equitable aſſets, the court will poſtpone him till there is an equality, in ſatisfaction to all the other creditors out of the equitable aſſets, proportionable to ſo much as the legal creditor has been ſatisfied out of the legal aſſets [y].

BUT now to return to the ſubject of paying debts with legal aſſets in ſuch manner as the law requires. If one that hath a debt due to him from the deceaſed upon a ſimple contract or the like, ſue the executor or adminiſtrator for it, and there be debts due to others upon bonds and ſpecialties, unſatisfied; in this caſe, the executor or adminiſtrator may not pay this debt, nor may he ſuffer the plaintiff to recover in his action; for if

[t] Caſe of Soam againſt Bowden and Eyles, in the court of Chancery, M. 30 Geo. II. Ch. Ca. Finch. 396.

[u] 3 P. Will. 341.

[w] 2 Vern. 764.

[x] 4 Burn's Eccleſ. Law, 297.

[y] *Ibid.*

he

he doth, and he hath not aſſets beſides to ſatisfy the debts due upon bonds and ſpecialties, he muſt ſatisfy ſo much out of his own eſtate, as he hath ſo paid, or ſuffered to be recovered from him; for in the caſe of an action brought, he is to plead and to ſet forth theſe debts upon ſpecialties, and to ſay that he hath no more than what is ſufficient to ſatisfy them; and thereby he ſhall bar the plaintiff in his action. In like manner it is, if one that hath a debt due to him from the deceaſed upon an obligation, ſue the executor or adminiſtrator thereupon, and there be debts due to others upon judgments, ſtatutes, or recognizances, and the executor or adminiſtrator ſuffer the plaintiff to recover the debt due upon the obligation, for want of pleading the judgments, &c. in this caſe he muſt pay ſo much out of his own eſtate, towards the ſatisfaction of the ſaid debts due upon judgments, &c. as he hath paid of the debt due upon the obligation. But here it muſt be obſerved, that no judgment or ſtatute that is diſcharged, or is left and ſuffered to lie by agreement to bar others of their debts, ſhall be any bar to others that ſue for their due debts upon obligations, &c. and therefore if any executor or adminiſtrator ſhall plead ſuch judgments, &c. in bar of any other debt ſued for by any other creditor, the creditor may, by ſpecial pleading, ſet forth this matter of covin, and avoid the plea and bar of the executor or adminiſtrator [z].

IN an action of debt againſt an executor, if the defendant plead fully adminiſtered, and any aſſets be found in his hands, although there be not to the value of the debt; yet the plaintiff ſhall have judgment for his whole debt of the goods of the teſtator [a]. But if it be found, that he had nothing in his hands; the judgment ſhall be, that the plaintiff ſhall take nothing by the writ, and ſhall not have judgment of the debt: for he hath waved this advantage by taking of the iſſue, and judgment is to be given upon the verdict [b].—Where a teſtator is much indebted, and the executor is deſirous to be rid of the aſſets, his ſafeſt way is, to file a bill in chancery againſt the creditors, to the end they may, if they think fit, conteſt each other's debts, and diſpute who ought to be preferred in payment [c].

[z] Shep. Touch. 457.
[a] 1 Roll's Abr. 929.
[b] *Ibid.*
[c] 2 Vern. 37.

SECTION THE SIXTH.

OF ACCOUNTING BEFORE THE ORDINARY.

BY the ſtatute of the 22 & 23 Car. II. c. 10. the ordinaries ſhall and may proceed and call adminiſtrators to account, for and touching the goods of any perſon dying inteſtate, and upon hearing and due conſideration thereof, order and make juſt and equal diſtribution of what remains clear (after all debts, funerals, and juſt expences, of every ſort, are allowed and deducted); and the ſame diſtributions decree and ſettle, and compel ſuch adminiſtrators to obſerve and pay the ſame, by the due courſe of his majeſty's eccleſiaſtical laws: ſaving to every one, ſuppoſing himſelf or themſelves aggrieved, their right of appeal, as has been always in ſuch caſes uſed. But by the ſtatute of the 1 Jac. II. c. 17. ſect. 6. it is provided, as was before mentioned[d], that no adminiſtrator ſhall be cited according to the ſaid act of the 22 & 23 Car. II. c. 10. to render an account of the perſonal eſtate of his inteſtate (otherwiſe than by an inventory or inventories thereof), unleſs it be at the inſtance or proſecution of ſome perſon in behalf of a minor, or having a demand out of ſuch perſonal eſtate as a creditor or next of kin, nor be compellable to account before any the ordinaries or judges, by the ſaid act impowered and appointed to take the ſame, otherwiſe than as is aforeſaid; any thing in the ſaid act to the contrary notwithſtanding.——The account muſt be paſſed before the ſame judge, or his ſurrogate or ſucceſſor, that grants the adminiſtration.

IF any perſon having intereſt ſhall call the adminiſtrator to exhibit a true, full, and perfect inventory of the goods of the deceaſed which have come to his hands, and to give an account of his adminiſtration thereof; he who is called in ſuch caſe, is bound perſonally to exhibit ſuch inventory and account, and (if the adverſe party demand it) to take a corporal oath of the truth thereof[e]. And as proofs made upon the account, at the inſtance of ſome one or more perſons having

[d] Pag. 15.

[e] Oughton's Ordo Jud. 345.

intereſt,

intereſt, do not bind others who are not parties to the ſuit; therefore, to prevent multiplicity of actions, it behoves the adminiſtrator, when he is cited by any one of the parties to render an account, to cite the next of kindred in ſpecial, and all others in general, having or pretending to have intereſt in the goods of the deceaſed to be preſent, if they think fit, at the rendering and paſſing the account. And then upon their appearance, or contempt in not appearing, the judge will proceed to give ſentence; and the account thus determined will be final[f].

AN executor or adminiſtrator ſhall be allowed all reaſonable expences, as well in law-ſuits, as for other honeſt purpoſes: And this reaſonableneſs of expences to be ſuch, as that he may receive thereby neither profit nor loſs[g]. And therefore he ſhall be allowed his expences in ſecular courts, over and above ſuch coſts as were allowed there[h].

IN an action of debt upon a bond entered into by an adminiſtrator to the ordinary, upon taking letters of adminiſtration, the queſtion was, Whether an adminiſtrator, by virtue of this obligation, was bound to go, and give in his account in the ſpiritual court without being cited? And by Holt, chief juſtice, who delivered the opinion of the court. 1. It appears by the ſtatute of Edward III. that an executor was compellable to account before the ordinary, and ſo was an adminiſtrator: but that the ordinary was to take the account as given in, and could not oblige them to prove the items of it, nor ſwear to the truth of them. So it was if a creditor ſued in the eccleſiaſtical court; for he had a proper remedy at common law. But if a legatee had ſued for an account in the eccleſiaſtical court, the defendant before the ſtatute was compellable to prove the whole account; for the legatee had no other remedy, and the eccleſiaſtical court, which had a juriſdiction of legacies, could not otherwiſe do right: yet in ſuch a caſe, if the executor would pay him, he could not ſue farther, for he had right done him, and the executor was not liable, but of neceſſity that right might be

[f] Oughton, 354.
[g] Lind. 178.
[h] Floyer's Proctor's Pract. 37.

done;

done. 2. A perſon intitled to diſtribution on the 22 Car. II. is in conſequence intitled to ſue for an account as a legatee was; for the next of kin is a legatee by the ſtatute, and as a ſtatute legatee, ſhall have the ſame remedy as the other legatee might before the ſtatute. The condition of an adminiſtration bound was, to account when required: therefore he was not to account before he was legally cited, which could not be *ex officio*[i]; and therefore the ſtatute of Jac. II. whereby the ordinary is prohibited from citing him in *ex officio*, had really no effect at all, for the law was ſo before: but ſince the ſtatute of Car. II. the condition of adminiſtration bonds being, that he account at a day certain, he muſt account accordingly at his peril, and that without citation or ſuit; and this account muſt be in court; and if he comes at the day, and no court is held, he ſhall be excuſed: for he may plead he was there ready, and no court held. But then this account is not examinable, unleſs a party intereſted comes in and controverts it[k].

IT is ſaid the ordinary hath but a lame juriſdiction, and there being no negative words in the ſtatute of Car. II. a bill for diſtribution properly lies in chancery[l]. And where the ſurplus of the perſonal eſtate for want of diſtribution by a will is diſtributable, there can be no ſuit for it in the ſpiritual court[m]. —— Where a man died inteſtate, and his widow took out letters of adminiſtration to him; the inteſtate's brother cited the widow into the ſpiritual court, to make diſtribution of her deceaſed huſband's eſtate. The widow there ſuggeſts, that the brother had goods of the inteſtate in his hands to the value of 200l. And upon this the ſpiritual court orders him to bring the 200l. into court, to the end it may be diſtributed. And for not bringing it in, they excommunicate him. Upon which he moves in the King's Bench for a prohibition; and it was granted as to the whole proceſs that compelled him to bring in the 200l. For by the court, the ſpiritual court hath power to make diſtribution of the eſtate, when it comes in, but not to fetch it in; becauſe that is to hold plea of debt; but the ſpiritual court might refuſe, in this caſe, to proceed to diſtribution, until the brother had brought in the 200l. but they cannot excommunicate him for not bringing it in[n].

[i] Explained, pag. 12.
[k] 2 Salk. 315.
[l] 2 Ver. 362.
[m] 5 Mod. 247. Str. 865.
[n] Caſe of Cleike and Cleike, T. 10. W. L. Raym. 585.

CHAP. III.

Of Diſtribution.

SECTION THE FIRST.

WHAT THE ADMINISTATOR IS TO OBSERVE BEFORE HE MAKES DISTRIBUTION.

BY the ſtatute of 22 & 23 Car. II. c. 10. whereby we have ſeen that ordinaries may call adminiſtrators to account, and order and compel them to make diſtribution[a]; it is enacted, to the end that a due regard be had to creditors, that no ſuch diſtribution of the goods of any perſon dying inteſtate be made, till after one year be fully expired after the inteſtate's death; and that ſuch, and every one, to whom any diſtribution and ſhare ſhall be allotted, ſhall give bond with ſufficient ſureties in the eccleſiaſtical courts, that if any debt or debts truly owing by the inteſtate, ſhall be afterwards ſued for and recovered, or otherwiſe duly made to appear; that then, and in every ſuch caſe, he or ſhe ſhall reſpectively refund and pay back to the adminiſtrator, his or her rateable part of that debt or debts, and of the coſts of ſuit and charges of the adminiſtrator, by reaſon of ſuch debt, out of the part and ſhare ſo as aforeſaid allotted to him or her.

BY the ſtatute of the 20 Geo. III. c. 28. it is enacted, That after the firſt of June 1780, there ſhall be charged on every ſkin or piece of vellum or parchment, or ſheet or piece of paper, upon which ſhall be ingroſſed, written, or printed, any receipt or other diſcharge, for any legacy left by any will or other teſtamentary inſtrument, or for any ſhare or part of a perſonal eſtate divided by force of the ſtatute of diſtribution, or the cuſtom of any province or place, the amount whereof ſhall not exceed the value of 20l. a ſtamp duty of 2s. 6d. And where the amount thereof ſhall be of the value of 20l.

[a] Pag. 61.

and

and not amounting to 100l. a ſtamp duty of 5s. And where the amount ſhall be of the value of 100l. and upwards, a ſtamp duty of 20s. And that ſuch receipt or other diſcharge ſhall be ſtamped before ingroſſed, written, or printed; and if the ſame is not ſtamped as by this act is directed, or ſhall be ſtamped for a lower duty than as aforeſaid, no ſuch receipt ſhall be pleaded, or given in evidence in any court, or admitted in any court to be good, uſeful, or available in law or equity. And by the ſtatute of the 23 Geo. III. c. 58. it is enacted, that from the firſt of Auguſt 1783, the following additional duty ſhall be added to the above, viz. On every ſkin or piece of vellum or parchment, or ſheet or piece of paper, on which ſhall be ingroſſed, written, or printed, any receipt or other diſcharge, for any legacy left by will or other teſtamentary inſtrument, or for any ſhare of a perſonal eſtate divided by force of the ſtatute of diſtributions, or the cuſtom of any province or place, the amount whereof ſhall not exceed the value of 20l. there ſhall be charged an additional ſtamp duty of 2s. 6d. And where the amount thereof ſhall exceed the value of 20l. and not amount to 100l. an additional ſtamp duty of 5s. And where the amount thereof ſhall be of the value of 100l. an additional ſtamp duty of 20s. and a like additional ſtamp duty upon every further ſum of 100l. So by this latter act, the receipt or diſcharge, that by the former was to be on paper or parchment ſtamped with a 2s. 6d. ſtamp, muſt now be on paper or parchment ſtamped with a 5s. ſtamp. And where it was to be a 5s. ſtamp, it muſt now be a 10s. ſtamp. And where it was to be a 20s. ſtamp, it muſt now be a 40s. ſtamp. And if the legacy or perſonal eſtate amount to 200l. the receipt or diſcharge for the ſame muſt be on parchment or paper ſtamped with a 60s. ſtamp, and ſo for as many hundred pounds as there are more than 100l. there muſt be ſo many 20s. added to the firſt forty; as for example, ſuppoſe the legacy or perſonal eſtate, for which there is to be a receipt or diſcharge, ſhould amount to 100l. then the paper or parchment on which it is to be written, printed, or ingroſſed, muſt have thereon a 40s. ſtamp; if it amount to 200l. a 60s. ſtamp; if it amount to 300l. an 80s. ſtampt; and ſo for as many hundred pounds as it amounts to more than 300l. ſo many more 20s. muſt be added to the 80s.

BUT in this latter act is contained a proviſo, that nothing therein contained ſhall extend to charge with the additional duties, by this act impoſed, any legacy left by will or other teſtamentary inſtrument, or any ſhare, or part of a perſonal eſtate, to be divided by force of the ſtatute of diſtributions, or the cuſtom of any province or place, which ſhall be left to the *wife*, *children*, or *grandchildren*, of the perſon making ſuch will, or ſhall be divided amongſt them by force of the ſaid ſtatute or cuſtom. So here it may be obſerved, that the wife, children, and grandchildren, are exempt from the duties to which others are liable by this act, but not from thoſe of the former act; therefore for any legacy or perſonal eſtate, the amount whereof ſhall not exceed the value of 20l. their receipt, or diſcharge, muſt be on paper or parchment, ſtamped with a 2s. 6d. ſtamp. And where the amount ſhall be of the value of 20l. and not to the amount of 100l. ſuch receipt or diſcharge muſt be on paper or parchment, ſtamped with a 5s. ſtamp. And where the amount ſhall be of the value of 100l. *and upwards*; on paper or parchment, ſtamped with a 20s. ſtamp. By the words *and upwards*, we may obſerve the wife, children, and grandchildren, are not liable to more than a ſtamp duty of 20s. if what they receive ſhould amount to more hundreds of pounds than the firſt 100l. for, till this latter act took place, 20s. was the utmoſt duty required.

SECTION THE SECOND.

OF MAKING DISTRIBUTION.

BY the ſtatute 22 & 23 Car. II. after debts and funeral expences are paid, the ſurpluſage of inteſtates eſtates (except the eſtates of femes covert; that is, married women, to which their huſbands have a right, as before mentioned [b]) ſhall, after the expiration of one full year from the death of the inteſtate, be diſtributed in the following manner: One third ſhall go to the widow of the inteſtate, and the reſidue in equal proportions to his children, or if the children be dead,

[b] Page 3.

to

to their repreſentatives, that is, their lineal deſcendants. But no child of the inteſtate (except his heir at law) on whom he ſettled in his lifetime any eſtate in lands, or pecuniary portion, equal to the diſtributive ſhares of the other children, ſhall have any part in the ſurpluſage with their brothers and ſiſters; but if their eſtates, ſo given them by way of advancement, are not quite equivalent to the other ſhares, the children ſo advanced ſhall now have ſo much as will make them equal [c]. But the heir at law ſhall have an equal part in the diſtribution with the other children, without any conſideration of the value of the land, which he hath by deſcent, or otherwiſe, from the inteſtate.

BY this ſtatute the heir at law ſhall not abate, in reſpect of the land which he hath by deſcent, or otherwiſe, from the inteſtate; yet if he hath had any advancement from his father in his lifetime, otherwiſe than by land as aforeſaid, he ſhall abate for the ſame in like manner as the other children. And ſo it ſeems that *coheireſſes* ſhall bring together into hotchpot, ſuch advancement (not being lands) as they ſhall reſpectively have received from their father, before they ſhall be intitled to recover their ſeveral diſtributive ſhares, agreeable to the general purport of the act; which is evidently to promote an equality as much as may be [d].

THIS word *hotchpot* is generally underſtood to ſignify mixing and blending together, and conveys much the ſame idea as the words *collatio bonorum* [e], which in the civil law is anſwerable to the word *hotchpot*, and ſignifies, that if a child advanced by the father, doth, after his father's deceaſe, challenge a child's part with the reſt, he muſt caſt in all that he had formerly received, and then take out an equal ſhare with the others [f].

IN reſpect to borough-engliſh lands, which by cuſtom deſcend to the youngeſt ſon, as we ſhall again ſee in the enſuing chapter [g]; it became a point upon the ſtatute of diſtribution, whether the youngeſt ſon (to whom the land de-

[c] Black. Com. 2 V. 515, 516.
[d] 4 Burn's Eccleſ. Law, 332.
[e] Black. Com. 2 V. 90.
[f] Jac. Dict. tit. Hotchpot, 10 edit.
[g] Pag. 102.

ſcended by the cuſtom of borough-engliſh) ſhould abate for theſe lands, or ſhould be conſidered as an heir at law, who by the ſtatute is to have a diſtributive ſhare, without any allowance for lands by deſcent. And it was ruled by Sir Joſeph Jekyll, maſter of the rolls, that he ſhould allow for theſe lands [h]. Yet where a man was poſſeſſed of a perſonal eſtate, and ſeiſed of a copyhold in fee, which was in the nature of borough-engliſh, and the queſtion was, whether the youngeſt ſon, upon whom the copyhold deſcended, ſhould have an equal ſhare with the other children of the perſonal eſtate, excluſive of the copyhold, or only ſo much as with that copyhold would make his portion equal to that of the other children. By lord chancellor Talbot. The heir at law is the eldeſt ſon, and not the heir in borough-engliſh; and the exception in the ſtatute extends only to the eldeſt ſon. Yet nevertheleſs the youngeſt ſon, who is heir in borough-engliſh, ſhall not bring the borough-engliſh eſtate into hotch-pot; there being no law to oblige him to do this, but only this ſtatute, and there are no words in the ſtatute that require it: for the ſtatute ſpeaketh only of ſuch eſtate as a child hath by ſettlement, or by advancement of the inteſtate in his lifetime. And it was decreed, that the youngeſt ſon ſhould have an equal ſhare with the other children, without regard to the value of the borough-engliſh eſtate. And the former caſe coming after this before the lord chancellor Talbot, he reverſed the decree of the maſter of the rolls, and decreed agreeable to this latter caſe [i].

IN reſpect to what ſhall be an advancement, ſo as to come within the meaning of the ſtatute, we may obſerve, it hath been determined, that ſmall inconſiderable ſums, occaſionally given to a child, cannot be deemed an advancement or part thereof. Thus maintenance money, or allowance made by the father to his ſon at the univerſity, or in travelling, or the like, is not to be taken as any part of his advancement, this being only his education;

[h] Str. 935.

[i] Caſ. Talb. 276.

and

and it would create charge and uncertainty, to enquire minutely into ſuch matters. So, putting out a child apprentice, is no part of his advancement; for it is only procuring the maſter to keep him for ſeven years inſtead of the parent. But the father's buying an office for the ſon, though but at will, as a gentleman penſioner's place, or a commiſſion in the army, theſe are advancements *pro tanto*, that is, for ſo much[k]. And a proviſion made by a marriage ſettlement, although it is in the nature of a purchaſe[l], is ſuch an advancement as that a child claiming a diſtributive ſhare, ſhall firſt bring the ſaid advancement into hotchpot. As where the father, on his ſon's marriage, covenanted, in caſe of a ſecond marriage, to pay the firſt ſon by the firſt wife 500l. There was a ſon, and ſeveral other children of the firſt marriage. The father of theſe children died inteſtate; and by the court it was agreed, that the heir muſt bring the 500l. into hotchpot, although in nature of a purchaſer under a marriage ſettlement[m]. So where a man on his marriage entered into articles, in conſideration of the marriage, and of 4000l. portion, to ſettle an eſtate to raiſe portions for daughters, in caſe there were no ſons; that is to ſay, if but one daughter the ſum of 5000l. if two or more then the ſum of 6000l. equally amongſt them, to be paid at their reſpective ages of 18 years, or days of marriage, which ſhould firſt happen; and 80l. a year maintenance in the mean time to each daughter. The marriage took effect; and they had iſſue one daughter only, and no ſon. Then the wife dies. Afterwards the man marries a ſecond wife, and had by her a ſon and a daughter, and died inteſtate, leaving a perſonal eſtate to the amount of 20,000l. The daughter by his firſt wife, at that time, was about 12 years of age; and ſometime after married one Mr. Edwards: and they brought their bill, to have an account of the perſonal eſtate of the wife's father, and their diſtributive ſhare thereof. And the only queſtion was, whether the 500l. ſhould not

[k] 3 P. Will. 317.

[l] Purchaſe means any method of acquiring an eſtate otherwiſe than by deſcent. Black. Com. 1 V. 214. And where a perſon takes any thing from an anceſtor or others by deed, will, or gift, and not as heir at law, this is a purchaſe. 2 Lill. Abr. 497.

[m] 2 Vern. 638.

be looked upon to be ſo far an advancement of the plaintiff, the wife of Mr. Edwards, that if ſhe would have any farther ſhare of her father's perſonal eſtate, they muſt bring this 5000l. into hotchpot. And the court, conſiſting of King lord chancellor, aſſiſted by Raymond chief juſtice, and the maſter of the rolls, and Price and Forteſcue, juſtices, were all clear of opinion, that this was an advancement by the father in his lifetime, within the meaning of the ſtatute, though contingent and future; ſo that ſhe could not have that and her diſtributive ſhare likewiſe. And accordingly the decree was pronounced [n].

IF the father ſettles a rent out of his lands upon a younger child, this is an advancement; ſo likewiſe if he by deed ſettles an annuity upon a child, to commence after his death, this is an advancement for ſo much: and by the ſame reaſon, a reverſion ſettled on a child as it may be valued, is an advancement alſo [o]. And if a child who has received any advancement from his father, ſhall die in his father's lifetime, leaving children; ſuch children ſhall not be admitted to their father's diſtributive ſhare, without bringing their father's advancement into hotchpot; as where a father had ſeveral children, and in his lifetime advanced one of them. The child, thus advanced in part, died in his father's lifetime, leaving iſſue. Afterwards the father died inteſtate, poſſeſſed of a conſiderable perſonal eſtate. It was ruled, that the iſſue of the dead child muſt bring into hotchpot what their father received in part of advancement, as he, if living, muſt have done; as that the iſſue ſtands in the place and ſtead of the father, claims under him, and cannot be in a better condition than the father, if living, would have been, and had claimed his diſtributive ſhare [p]. —— A child, partly advanced, ſhall bring in his advancement only amongſt the other children; ſo that the wife ſhall have no advantage of it [q].

BY what has been ſaid, it may be perceived, that, where the inteſtate leaves a widow and children, or the repreſentatives of children, one-third of his perſonal eſtate ſhall go to

[n] Caſe of Edwards and Freeman, 1 Abr. Eq. Caſ. 249.

[o] 2 P. Will. 141. 442.

[p] 4 Burn's Eccleſ. Law, 337.

[q] *Ibid.* 339.

his

his widow, and the reſidue to his children; or if dead, to their repreſentatives, that is, their lineal deſcendants, ſuch of the children, or the repreſentatives of ſuch of them as have been advanced as aforeſaid, firſt bringing ſuch advancement into hotchpot, in caſe they chooſe to claim their diſtributive ſhare; and of ſuch advancement, when the ſame ſhall be ſo brought into hotchpot, the widow ſhall have no advantage. Now we may conſider how the reſidue of the inteſtate's eſtate is to go to his children, or if dead to their repreſentatives, that is, their lineal deſcendants. And here we may obſerve; the doctrine and limits of repreſentation, as laid down in the ſtatute of diſtributions, ſeem to have been principally borrowed from the civil law: whereby it will ſometimes happen that perſonal eſtates are divided *per capita*, as when every claimant claims in his own right; and ſometimes *per ſtirpes*, as when the claimants claim by repreſentation, or in the right of another. They are divided *per capita* to every one an equal ſhare, when all the claimants claim, in their own rights, as in equal degree of kindred, and not by repreſentation in the right of another perſon[r]. That this may be rightly underſtood, let us firſt ſuppoſe that neither of the inteſtate's children hath died leaving children. 2. That the inteſtate's children are all dead; whether they were two, or three, or more; each of them having left children; as it may be one of them two, another three, or more. 3. That ſome of the inteſtate's children are living, and ſome dead; and that thoſe who are dead have each left children.

As to the firſt ſuppoſition, it is ſufficiently clear, that if neither of the inteſtate's children hath died leaving children, the reſidue as aforeſaid, or the remaining two-thirds, after the wife has had her third, ſhall be equally divided between all the children of the inteſtate; as in this caſe they all claim in their own right: and where a man marries a woman, and hath iſſue by her, as it may be ſons and daughters, and the wife dying, he marries another woman, by whom he hath alſo ſons and daughters: now theſe, though they are called brothers and ſiſters, are but brothers and ſiſters of the half-blood; becauſe they had not both but one father and mother[s]: yet between

[r] Black. Com. 2 V. 517. [s] Terms de Ley.

theſe no diſtinction is, or (as I conceive) ever was made; but in reſpect to collaterals[t], who may take where there are no lineal deſcendants; there are ſeveral precedents of judgments given ſince the ſtatute, allowing the half-blood to have but an half ſhare: but now theſe are upon the ſame footing with the whole blood, in reſpect to what they are intitled to in the diſtribution of perſonal eſtate[u]. Yet, in reſpect to real eſtate, the whole blood is always preferred, and the half blood is no blood inheritable by deſcent, as we ſhall ſee in the enſuing chapter[w]. Where a father leaves behind him one or more children, and his widow ſhall happen to be with child, the child in the mother's womb will be reckoned among the children of the deceaſed; and if the other children ſhould proceed to a partition of the eſtate, it will be neceſſary to lay aſide one ſhare for the child that is to be born, and to name a curator to it, who may take care of its intereſt[x]. But this proviſion is rendered more effectual by the ſtatute; which, as we have ſeen[y], requires that no diſtribution ſhall be made till after the expiration of one year from the inteſtate's death, within which time the child will be born.

As to the ſecond ſuppoſition, as that the inteſtate's children are all dead, whether they were two, or three, or more, each of them having left children, as it may be one of them two, another three, or more: in this caſe, where there be only grandchildren, their fathers or mothers reſpectively having died in the lifetime of their grandfather, the grandchildren take in their own right, and not by repreſentation of their father or mother deceaſed; and the courts, where diſtributions are cognizable, will order an equal diſtribution to be made[z]. And thus it would be, if there were only great-grandchildren of the inteſtate, both his children and grandchildren having all died before him.

As to the third ſuppoſition, as that ſome of the inteſtate's children are living and ſome dead, and thoſe that are dead have left children: in this caſe, the grandchildren take by

[t] Who theſe are, ſee pag. 77.
[u] 4 Burn's Eccleſ. Law, 357.
[w] Pag 91.
[x] 1 Strah. Dom. 624.
[y] Pag. 64.
[z] 4 Burn's Eccleſ. Law, 347.

repreſentation,

repreſentation, and not in their own right, and the iſſue of each deceaſed child ſtand in the place and ſtead of their deceaſed parent. As ſuppoſe the inteſtate to have had three children, A, B, and C, and one of theſe children to be dead, as it may be A, leaving three children, and another dead, as it may be B, leaving two; then the diſtribution muſt be one third to A's three children, another third to B's two children, and the remaining third to C, the ſurviving child. But if C had alſo died, and left no iſſue, then A's and B's five children, being all in equal degree of kindred, would take in their own right, each of them an equal ſhare, in like manner as is juſt before mentioned under the ſecond ſuppoſition.

BY this we may perceive in what manner the inteſtate's perſonal eſtate is to be diſtributed, where he has left a wife and children, or repreſentatives of children. But before we conclude this, and proceed to another part of the ſtatute of diſtributions, it may be proper to obſerve, that if the inteſtate leaves but one child, or the repreſentative, that is, the lineal deſcendant of one child, ſuch one child, or the repreſentative of ſuch, will be entitled to the ſame ſhare in the diſtribution, as if there were more than one. For where there is only one perſon that can take, the ſtatute veſts the right in that perſon [a]. And although by the ſtatute, no diſtribution is to be made within a year; yet the right of the diſtributive ſhare veſts immediately on the inteſtate's death. As where a perſon, intitled to a diſtributive ſhare of an inteſtate's eſtate, died within a year after the inteſtate, it was decreed that the ſhare of the deceaſed perſon was an intereſt veſted and tranſmiſſable to his executors or adminiſtrators; for in this ſenſe the ſtatute makes a will for the inteſtate, and it is as if a legacy was bequeathed payable a year hence, which would plainly be an intereſt veſted preſently [b].

BY the ſtatute 22 & 23 Car. II. c. 10. ſect. 6. In caſe there be no children, nor any legal repreſentatives of them, then one moiety of the inteſtate's eſtate is to be allotted to the wife of the inteſtate; and the reſidue to be diſtributed to every the next of kindred of the inteſtate, who are in equal degree, and thoſe who legally repreſent them.

[a] 2 P. Will. 50. [b] 3 P. Will. 49.

BY

BY ſect 7. No repreſentation is to be admitted among collaterals after brothers and ſiſters children [c]. And in caſe there be no wife, then all the ſaid eſtate is to be diſtributed to and amongſt the children. And in caſe there be no child, then to the next of kindred in equal degree of or unto the inteſtate, and their legal repreſentatives, as aforeſaid.

HENCE we may perceive, that where the inteſtate leaves no child, or any legal repreſentative of a child, that is, lineal deſcendant, there the wife has a moiety, or one-half of his perſonal eſtate; and if there be no wife, then all the eſtate is to be diſtributed amongſt the children; and if there be no child, then amongſt the next of kindred in equal degree of or unto the inteſtate. But if there be a child, or repreſentative, that is, lineal deſcendant, then the next of kindred will be totally excluded. For if a perſon dies inteſtate, leaving a deſcendant of either ſex, or of whatſoever degree, ſuch deſcendant is to be preferred to all aſcendants and collaterals. And herein agree the civil, canon, common, and ſtatute laws [d]. So if there be children, or repreſentatives of children, and no wife, we muſt obſerve what has been before ſaid reſpecting children that have been advanced, bringing ſuch advancement into hotchpot; and then how the eſtate is to go to the inteſtate's children, or if dead, to their repreſentatives; as here diſtribution muſt be made of the whole perſonal eſtate, in the ſame manner as where there is a wife, diſtribution muſt be made of two-thirds [e].

THUS having proceeded, as far as relates to the inteſtate's widow and children, before we enter any farther into the ſtatute of diſtribution, we may take notice of the ſtatute of 1 Jac. II. c. 17. whereby it is enacted, that if after the death of a father, any of his children ſhall die inteſtate, without wife or children, in the lifetime of the mother; every brother and ſiſter, and the repreſentatives of them, ſhall have an equal ſhare with her. Before this ſtatute, if a child had died inteſtate, without a wife, child, or father, the mother would have been intitled to the whole perſonal eſtate [f]; as the father ſurviving is at this day [g]: and the reaſon of making this ſtatute was, becauſe

[c] See this explained page 77.
[d] 4 Burn's Eccleſ. Law, 346.
[e] See pag. 70—73.
[f] 4 Burn's Eccleſ. Law, 349.
[g] 2 P. Will. 48.

the

the mother might marry and carry away all to another husband [h]. Upon this ſtatute it has been determined, that where, after the death of the father, the ſon died inteſtate without iſſue; but leaving a wife, a mother, three brothers, a ſiſter, and two nieces, the children of a deceaſed brother; that this is within the ſtatute, and that the inteſtate's wife ſhall have but one moiety; and as to the other moiety, the inteſtate's brothers and ſiſters, and the two nieces, ſhall come in for an equal ſhare with the mother [i]. But if there be no brother or ſiſter, or repreſentative of brother or ſiſter, then it is out of the ſtatute, and the mother ſhall have the whole, as ſhe had before the making of it [k]. Hence it is obvious, that if a child dies without iſſue, then comes in the father; if the father be dead, then come in the mother, brothers, and ſiſters; but, if there be no brother or ſiſter, or repreſentative of a brother or ſiſter, which muſt be a child or children; (as has been determined upon the conſtruction of the ſtatute of Car. II. [l], and it is the ſame in reſpect of this ſtatute of Jac. II. [m]); then the mother takes the whole, or the half where there is a wife, and the whole where there is no wife: as the father always doth if living, and that in excluſion of the inteſtate's brothers and ſiſters, and their children. ——A brother or ſiſter of the half blood ſhall have an equal ſhare with thoſe of the whole blood [n]. And upon the conſtruction of the ſtatute of Car. II. it has been determined that a *poſthumous* brother or ſiſter, or brother or ſiſter born after the father's death, ſhall ſhare equally with the other brothers and ſiſters [o]. But upon the conſtruction of this ſtatute of Jac. II. it was a queſtion whether a *poſthumous* ſiſter was intitled to a ſhare of her brother's perſonal eſtate equally with her mother? and after many arguments had thereon, lord chancellor Hardwick decreed for the *poſthumous* ſiſter [p].

[h] 1 Salk. 251.

[i] 2 P. Will. 314.

[k] 4 Burn's Eccleſ. Law, 362.

[l] See pag. 77.

[m] Caſe of Stanley and Stanley, 1 Atk. 458.

[n] *Com. Dig.* Adminiſtration (H).

[o] Caſe of Burnet and Man, Vez. 156.

[p] Caſe of Wallis and Hodſon, 4 Burn's Eccleſ. Law, 365.

IN

IN reſpect to how diſtribution is to be made, between the inteſtate's mother, brothers, and ſiſters, we may obſerve, that each of theſe ſhare alike; as where a man died inteſtate, and without iſſue, leaving a wife and ſeveral brothers and ſiſters, and his mother living, the wife, under the ſtatute of Car. II. takes a moiety; and a queſtion ariſing upon the ſtatute of Jac. II. how the other moiety ſhould be diſtributed, whether the mother ſhould have the whole, or only a diſtributive ſhare with the brothers and ſiſters? a bill was brought, in order to have the opinion of the court. Upon hearing, the lord chancellor King was clearly of opinion, and decreed, that the mother ſhould have no more than a ſhare of the other moiety, with the brothers and ſiſters of the inteſtate; for the intent of the ſtatute was, to put the mother (who before ſtood upon the ſame footing with the father) in the ſame ſtate and condition with theſe collaterals; ſo that whenever ſhe is intitled, they ſhall have an equal ſhare with her [q]. But where a man died inteſtate, leaving a wife, and a mother living, and children of a brother deceaſed; theſe children, as repreſentatives of their father, bringing a bill to have one half of the moiety of the inteſtate's eſtate, the wife being intitled to the other moiety, and the mother (as they inſiſted) to have only an equal ſhare with them; lord chancellor Hardwick ordered the reſidue of the inteſtate's eſtate, after ſatisfaction of debts, to be divided into four equal parts; two-fourth parts thereof to go to the widow, one-fourth to the mother, and one-fourth to the brother's children [r].—If a brother or ſiſter is living, and alſo children of a deceaſed brother or ſiſter, ſuch children will take *per ſtirpes*, as hereafter mentioned (p. 81.)

HAVING proceeded thus far with the ſtatute of 1 Jac. II. we may now return to that part of the ſtatute of diſtributions that relates to collaterals, and the inteſtate's next of kindred in equal degree, ſo proceed gradually from the neareſt to the moſt diſtant relations; and here we may firſt take notice of what is ſaid relative to collaterals, and then, of what is ſaid relative to the inteſtate's next of kindred, in equal degree. As to collaterals the ſtatute ſays, "There is no repreſentation

[q] Caſe of Keilway and Keilway, T. 12 Geo. II. Str. 710.

[r] Caſe of Stanley and Stanley, May 14, 1739. 1 Atk. 458.

admitted

admitted among collaterals after brothers and ſiſters children." Upon theſe words of the ſtatute, where the queſtion was, Whether theſe words were intended of brothers and ſiſters to the inteſtate, or whether, when diſtribution falls out amongſt brothers and ſiſters, though remote relations to the inteſtate, repreſentation ſhould be admitted amongſt them? it was held, that repreſentation ſhould only be between the brothers and ſiſters to the inteſtate [s]. And this repreſentation amongſt brothers and ſiſters does not extend to their grandchildren. For where the perſons claiming diſtribution were a deceaſed brother's daughter, and the grandchildren of another deceaſed brother; it was held that the deceaſed brother's daughter only was intitled; and that a deceaſed brother's or ſiſter's grandchildren ſhould not come in with a deceaſed brother's or ſiſter's children [t]. And as to repreſentation among other relations: Where a man died without wife or child, brother or ſiſter, and his next of kin were an uncle by his mother's ſide, and a deceaſed aunt's child; upon a demurrer, the court of chancery allowed the uncle to have the whole, and the deceaſed aunt's child nothing [u]; and though this may ſeem hard, yet, as the lord chancellor ſaid in this caſe, ſo is the law.

As to the part of the ſtatute where it is ſaid, "The next of kindred in equal degree of or unto the inteſtate, and their legal repreſentatives;" by what has been juſt mentioned it may be perceived, that theſe words, "their legal repreſentatives," are wholly confined to the inteſtate's brothers and ſiſters, and that no repreſentation is admitted among collaterals after brothers and ſiſters children; by which the number of perſons intitled are leſs than they otherwiſe would be.—We may now conſider who are thoſe next of kindred in equal degree of or unto the inteſtate, that may be intitled to his eſtate? And here we may obſerve, that kindred are diſtinguiſhed either by the right line or by the collateral. The right line is of parents and children, computing by aſcendants and deſcendants; the collateral line is between brothers and ſiſters, and the reſt of the kindred, among themſelves. Thoſe of the right line are reckoned upwards as parents, or downwards as children; thoſe of the collateral line

[s] Caſe of Maw and Harding, 2 Vern. 333.

[t] Caſe of Pett and Pett, 1 P. Will. 25. 1 Salk. 250.

[u] Caſe of Bower and Littlewood, 1 P. Will. 594.

are reckoned *ex tranſverſo*, or ſide-ways, as brothers and ſiſters, uncles and aunts, and ſuch as are born from them [w]. Amongſt thoſe there are different degrees of kindred, which are differently reckoned by the civil and canon laws, yet in the aſcending and deſcending lines, the degrees are the ſame by both laws; but in the collateral line they differ [x]. And for the diſtribution of perſonal eſtate, thoſe degrees of kindred are reckoned according to the computation of the civil law; and not of the canon law, which the law of England adopts in the deſcent of real eſtates [y]. In the deſcending line, the ſon is in the firſt degree, the grandſon in the ſecond, and the great grandſon in the third. In the aſcending line, the father is in the firſt degree, the grandfather in the ſecond, and the great grandfather in the third. In the collateral line, as reckoned according to the computation of the civil law, we aſcend firſt to the father, which is one degree; from him to the common anceſtor, the grandfather, which is the ſecond degree; from the grandfather we deſcend to the uncle, which is the third degree; and from the uncle to the couſin-german, or uncle's child, which is the fourth degree. So again we aſcend to the father, which is one degree; from the father we deſcend to the brother, which is the ſecond degree; from the brother to the nephew, which is the third degree; and from the nephew to the ſon of the nephew, which is the fourth degree [z].

How ſome of thoſe degrees of kindred will be intitled to the inteſtate's perſonal eſtate, will be ſeen by the following adjudged caſes; which, after being related, ſome obſervations will be made concerning the perſons who will be intitled to ſuch perſonal eſtate, purſuant to the ſtatutes of 22 & 23 Car. II. and 1 Jac. II. and thereby we may have a brief and comprehenſive view of them.

IN many caſes where it hath happened, that the next of kindred to the inteſtate were a grandfather and a brother, ſuits have been commenced to determine their right: but

[w] Ayliffe's Parergon, 327.
[x] 4 Burn's Eccleſ. Law, 343.
[y] Black. Com. 2 V. 504.
[z] 4 Burn's Eccleſ. Law, 348.

now

now this point ſeems to be fully determined, in conſequence of three determinations, the firſt of which was in the caſe of *Pool* and *Wilſhaw*, T. 1708. The ſecond in the caſe of *Norbury* and *Vicars*, before Forteſcue, maſter of the Rolls, M. 1749; and the third was delivered by lord chancellor Hardwick, in the caſe of *Evelyn* and *Evelyn*, H. 1754, and determined in favour of the brother, in excluſion of the grandfather. In delivering the determination of the court in this caſe. By lord chancellor Hardwick. This caſe is between the grandfather and brother of the deceaſed. It is inſiſted on behalf of the grandfather, that he is in equal degree of conſanguinity with the brother of the deceaſed, and intitled to an equal ſhare of his eſtate, under the ſtatute of diſtribution. The ſtatute ſays, that the ordinary (in caſe there ſhall be no wife, children, or childrens children) ſhall make a juſt and equal diſtribution among the next of kindred to the dead perſon, in equal degree, or legally repreſenting their ſtocks, *pro ſui cuique jure*, "according to the laws in ſuch caſes, and the rules and limitations hereafter ſet down." Which limitation is only a particular ſpecification, in what caſes repreſentation ſhall be allowed; and there is nothing more expreſſed in the ſtatute, than that the eſtate ſhall be diſtributed equally to every the next of kin to the inteſtate, who are in equal degree.—This point has been already twice determined in courts of equity. Firſt in the caſe of *Pool* and *Wilſhaw*, and afterwards in the caſe of *Norbury* and *Vicars*. But it has been inſiſted on for the grandfather, that both theſe decrees are erroneous. Notwithſtanding I ſhall adhere to the determination of the caſe of *Pool* and *Wilſhaw*, I have ſeen the lord chief baron Ward's, and Mr. baron Price's reports of this caſe; and alſo that of Mr. Dodd (afterwards chief baron). The laſt of which, though but ſhort, is the cleareſt of the three. It was a bill brought by the grandmother, for a ſhare of her grandſon's eſtate, equally with his brother. And it was inſiſted on for her, that ſhe was in equal degree of conſanguinity, and equally intitled; but the reporter ſays, "All the court contrary, and there "has been no ſuch uſage ſince the making of the ſtatute." And I

know of none ſince; though it is 83 years ſince that ſtatute was made. The ſubſequent decree at the Rolls was conformable to this; and therefore I ſhall not attempt to overthrow theſe determinations. And after a full diſcuſſion of the ſubject, the lord chancellor concludes, by ſaying, that ſince not only the reaſons are on this ſide the queſtion, but the determinations have been that way, and to overthrow them would tend to introduce inconveniencies, as it might diſturb diſtributions already made, which is an argument of the greateſt weight in the law, I ſhall determine this point in favour of the brother, to the excluſion of the grandfather [a].

WHERE the inteſtate leaves a grandmother and an aunt, the grandmother will be intitled in excluſion of the aunt; and as to this, lord chief juſtice Holt ſaid, that as by the common law father and mother were nearer than brother and ſiſter, ſo grandfather and grandmother are nearer than uncle and aunt. And the grandmother is the root of the kindred, whereas the aunt is only a branch [b]. So in a cauſe in the court of chancery, it was clearly agreed, that if one dies inteſtate, leaving a grandmother and uncles and aunts, the grandmother is intitled to the perſonal eſtate, in excluſion of the uncles and aunts [c].—Where the next of kindred to the inteſtate were a grandfather by the father's ſide, and a grandmother by the mother's, it was decreed, that they ſhall take in equal moieties, as being in equal degree; for though the grandfather by the father's ſide may in ſome reſpects be more worthy of blood, yet in this reſpect dignity of blood is not material [d]; though it is in reſpect of the deſcent of lands, as we ſhall ſee in the enſuing chapter [e].—Where the inteſtate left two aunts, and a nephew, and a niece, children of a deceaſed brother, lord chancellor Hardwick ordered the ſurplus to be divided into four parts equally amongſt them, they being all in equal degree, and therefore the children do not take by repreſentation, but in their own right; but if the father of the nieces had been living, he would have taken the whole [f].

[a] 4 Burn's Eccleſ. Law, 351.
[b] Caſe of Blackborough and Davis, 1 Salk. 38. 351. 12 Mod. 623. 1 P. Will. 51.
[c] Caſe of Woodroffe and Wickworth, Prec. Cha. 527.
[d] 1 P. Will. 53.
[e] Pag. 87.
[f] Caſe of Durand and Preſtwood, 1 Atk. 455.

HERE

HERE, as was propoſed, we may obſerve, who thoſe perſons are that will be entitled to the inteſtate's perſonal eſtate, purſuant to the ſtatutes of the 22 & 23 Car. II. and 1 Jac. II. As in the firſt inſtance, where a man dies leaving a wife and children; the wife has a third, the children and the repreſentatives of deceaſed children the other two thirds[g]. 2. If there be no wife, the children, and repreſentatives of deceaſed children, have the whole; and that in excluſion of all aſcendents and collaterals whatever[h]. 3. In caſe there be no child, or repreſentative of any child, that is, lineal deſcendant; then the wife has always one half, whoever has the other half[i]. 4. If there be no wife nor lineal deſcendant, then the inteſtate's father, if living, has the whole[k]. 5. If the father be dead, then the inteſtate's mother, brothers and ſiſters, and the children of the deceaſed brothers and ſiſters (if any), have the whole[l]. 6. If there be no brother or ſiſter of the inteſtate, or child of a brother or ſiſter, then the mother has the whole[m]. 7. Where the deceaſed leaveth neither wife nor child, nor repreſentative of ſuch child, nor father, nor mother; but leaves brothers and ſiſters, and children of other brothers and ſiſters deceaſed; the brothers and ſiſters, and the children of the brothers and ſiſters deceaſed, have the whole, and the children of the brothers and ſiſters deceaſed take *per ſtirpes*, and not *per capita*; for the children of the deceaſed, being not equal in degree with their uncles and aunts, do take in this caſe, not in their own rights, but by way of repreſentation of their parents deceaſed. As if there had been three brothers of the deceaſed, A, B, and C; and A had died, leaving three children, and B leaving two; the diſtribution muſt be one third to A's three children, another third to B's two children, and the remaining third to C the ſurviving brother. But if the three brothers had all been living, then the inteſtate's eſtate muſt have been divided into three equal portions, and diſtributed *per capita*, one to each, as has been ſaid concerning the inteſtate's children and grandchildren[n].——Where all the brothers and ſiſters of the inteſtate are dead, ſome having left children, as it may be, ſome a greater, others a leſs number; thoſe

g Pag. 70—73.
h Pag. 74.
i Pag. 73—75.
k Pag. 74. 75.
l Pag. 75, 76.
m Pag. 75.
n Pag. 71—73.

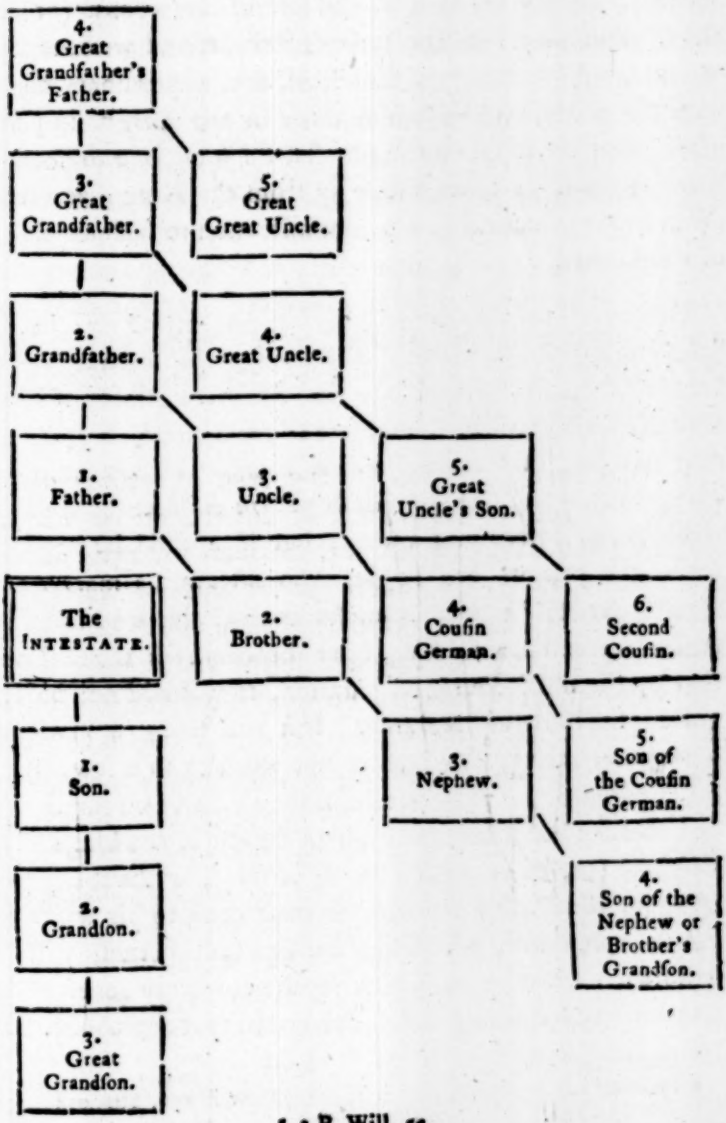
children of the brothers and ſiſters deceaſed, take *per capita* each an equal ſhare, as has been obſerved before reſpecting the inteſtate's grandchildren [o]. 9. If a perſon die inteſtate, leaving neither wife nor child, nor repreſentative of ſuch child, nor father nor mother, nor brother nor ſiſter, but hath a grandfather or grandmother living; then the grandfather or grandmother has the whole perſonal eſtate, in excluſion of the inteſtate's uncles and aunts; and if there be a grandfather on the father's ſide, and a grandmother on the mother's ſide, the whole is divided between them; and ſo it is if there be a grandmother on the father's ſide, and a grandfather on the mother's ſide [p]. 10. If a perſon die inteſtate, leaving neither wife nor child, nor repreſentative of ſuch child, nor father nor mother, nor brother nor ſiſter, nor grandfather nor grandmother, but leaving uncles and aunts, and brother's or ſiſter's children; thoſe uncles and aunts, whether on the father's ſide or mother's, will ſhare the inteſtate's whole perſonal eſtate, together with his brother's and ſiſter's children [q].

IF a perſon die inteſtate, leaving none of thoſe relations, the general rule by the ſtatute of diſtribution is, that his perſonal eſtate ſhall go to his next of kindred in equal degree; and thoſe may be the children of his uncles or aunts, and his brothers or ſiſters grandchildren, all of whom being in the fourth degree, will ſhare equally alike; and if there is but one perſon that can take, as being the only perſon who is the neareſt of kin, the ſtatute veſts the whole in that perſon [r].—For further diſcovering the degrees of kindred, when none of thoſe that have been mentioned are to be found, we may obſerve the following table, which is laid down conformable to what has been before mentioned reſpecting the mode in which the different degrees of kindred are to be reckoned. We may likewiſe obſerve, that where there are relations, both by the father's ſide and mother's, in equal degree

[o] Pag. 72.
[p] Pag. 80.
[q] *Ibid.*
[r] Pag. 73.

of

of kindred, they ſhare equally alike; for here there is no difference (though there is in reſpect of real eſtate, as will be ſeen in the enſuing chapter), whether the relations be by the father's ſide or by the mother's; but thoſe who are neareſt of kin will be preferred, be it by either ſide[s]; and the half blood will be equally entitled with thoſe of the whole blood.



[s] 1 P. Will. 53.

IF the inteſtate have no kindred, his eſtate will eſcheat to the King, or to the lord of the manor, or other perſon entitled thereto, by virtue of any grant from the Crown; for where no perſon can claim any property, there the King ſhall be entitled by his prerogative. Where a baſtard who has no kindred, being, as the law terms him, *nullius filius*, that is, the ſon of no one, or as he is ſometimes termed, *filius populi*, that is, the ſon of the people (or any one elſe that has no kindred), dies inteſtate, and without wife or child, it hath formerly been held, that the ordinary might ſeize his goods, and diſpoſe of them in *pios uſus*, or in pious uſes. But the uſual courſe now is, for ſome one to procure letters patent, or other authority from the King; and then the ordinary of courſe grants adminiſtration to ſuch appointee of the Crown [t].

HENCE it may be perceived, that no baſtard can be intitled to any ſhare in the diſtribution of an inteſtate's perſonal eſtate; and in reſpect to real eſtates or eſtates of inheritance, which will be the ſubject of the enſuing chapter; we may obſerve, that no baſtard is capable of inheriting or being heir to any one.——Baſtards are children born out of wedlock, or before matrimony; but if a child be begotten while the parents are ſingle, who afterwards marry, and thereby the child is born in lawful wedlock, he is no baſtard [u]. And children born ſo long after the death of the huſband, that by the uſual courſe of geſtation, they could not be begotten by him, are baſtards. But this being a matter of ſome uncertainty, the law is not exact as to a few days [v]. So children born during wedlock may in ſome circumſtances be baſtards: as in caſe the huſband be out of the kingdom of England (or, as it is commonly phraſed, without the four ſeas) for above nine months, ſo that acceſs to his wife cannot be preſumed, her iſſue, during that period, will be baſtards [w]. But generally during the coverture acceſs of the huſband is preſumed, unleſs the contrary be proved [x]. In

t Black. Com. 2 V. 505.
u Co. Litt. 244.
v Cro. Jac. 541.
w Co. Litt. 244.
x 3 P. Will. 276. Stra. 925.

caſe of a divorce in the ſpiritual court *a vinculo matrimonii*, or from the band of matrimony, all the iſſue born during the coverture are baſtards; for ſuch an abſolute annulling of the marriage can only take place where ſome cauſe is ſhewn, which made the marriage unlawful from the beginning.

BESIDES what has been mentioned concerning baſtards, it ſhould be obſerved, that it muſt be conſanguinity or relationſhip by blood, and not affinity, a relationſhip by marriage, whereby perſons may be intitled as kindred to an inteſtate's eſtate; for as to ſuch as have married with any of the inteſtate's family or relations who have died before him, no advantage can accrue to them by ſuch marriage: for example, ſuppoſe A was to die inteſtate, and the only iſſue he ever had were a ſon and a daughter, both of whom had married and died before him, leaving a wife and huſband, who ſurvived him; neither this wife nor huſband would have any part of A's eſtate, though the iſſue of his ſon and daughter, with his wife (if ſuch were living), would have the whole; but if none of them were living, the whole would go to his next of kindred in ſuch manner as has been ſhewn. And if A had died inteſtate without wife or child, and his only kindred had been a brother and ſiſter, both of whom had married and died before him, leaving a wife and huſband, who had ſurvived him; neither this wife nor huſband would be intitled to any part of A's eſtate; but in this caſe he would die without kindred, and his eſtate would eſcheat to the King, or lord of the manor, or other perſon who might be intitled thereto by virtue of any grant from the Crown, as before-mentioned; and ſo it would be in reſpect to the huſband of A's mother, and the huſband or wife of any one that were his next of kin, and had married and died before him. But in caſe his ſon or daughter, brother, ſiſter, or mother, or any other who were his next of kin, had ſurvived him, and died in ever ſo ſhort a time after, then the huſband or wife of him, or ſhe that had ſurvived him, might be intitled; that is, the huſband in right of the wife, and the wife in reſpect of her huſband; but neither of them as being of kin to A. The right of the diſtributive ſhare veſts immediately on the inteſtate's death, as was before mentioned [y]. Although by the ſtatute no diſtribution is to be made within a year; yet the ſhare of the deceaſed perſon is an intereſt veſted and tranſmiſſable to his executors or adminiſtrators.

[y] Pag. 73.

CHAP. IV.

The Deſcent of real Eſtates, or Eſtates of Inheritance. How the Law diſpoſes thereof to the Heir; the Huſband of a deceaſed Wife, and the Wife of a deceaſed Huſband.

SECTION THE FIRST.

HOW THE LAW DISPOSES OF THE INHERITANCE TO THE HEIR.

ALL freehold eſtates are called real eſtates, and may be of inheritance or not of inheritance, as mentioned page 28. The principal freehold eſtates of inheritance are fee-ſimple, and fee-tail. There are other eſtates of inheritance, and which deſcend according to the cuſtom of gavelkind, borough-engliſh, and the cuſtoms of manors, yet do not all come under the legal deſcription of freehold; with thoſe latter, as well as the former, an adminiſtrator, as ſuch, has no concern, except it be with the eſtate held *pur auter vie*, (mentioned page 30). To avoid confuſion, thoſe latter eſtates will be defined towards the end of this chapter.—Fee-ſimple is where a man hath lands, tenements, or hereditaments, (the latter of which comprehend not only all kinds of ground, as arable or plowed ground, meadows, paſtures, woods, moors, marſhes, and all kinds of houſes, edifices, or buildings, which are called corporeal hereditaments, but alſo advowſons or rights of preſentation to churches, commons, ways, offices, dignities, penſions, annuities, and rents, which are called incorporeal hereditaments); to hold to him and his heirs for ever, generally, abſolutely, and ſimply, without any particular heirs being mentioned, but that being referred to his own pleaſure, or the diſpoſition of the law, in caſe he makes no diſpoſition thereof himſelf, as he may to whom he thinks fit. And hence we may perceive, that this eſtate may conſiſt both of corporeal and incorporeal hereditaments, or either [a]. But no perſon can be properly ſuch an anceſtor, as that an inheritance in lands or tenements can be derived from him, unleſs he hath had actual ſeiſin of ſuch lands, either by his own entry, or by the poſſeſſion of his own or his anceſtor's leſſee for years, or by receiving rent from a leſſee of the freehold; or unleſs he hath had what is equivalent to corporal ſeiſin in hereditaments that are incorporeal; ſuch as the receipt of rent, a preſentation to the church in caſe of an advowſon, and the like [b]. And therefore all the caſes which will be hereafter

[a] See page 24.

[b] Black. Com. 2 V. 209.

mentioned

mentioned (reſpecting deſcent to the heir), are upon the ſuppoſition that the deceaſed was the laſt perſon actually ſeiſed of the inheritance. For the law requires this notoriety of poſſeſſion, as evidence that the anceſtor had that property in himſelf which is to be tranſmitted to his heir[c].

DESCENT, or hereditary ſucceſſion, is a title whereby a man, on the death of his anceſtor, acquires his eſtate by right of repreſentation, as his heir at law. An heir therefore is he upon whom the law caſts the eſtate immediately on the death of the anceſtor: and an eſtate ſo deſcending to the heir, is in law called the inheritance. The doctrine of deſcents, or law of inheritances in fee-ſimple, is a point of the higheſt importance, and the principal object of the laws of real property in England. All the rules relating to purchaſes, whereby the legal courſe of deſcent is broken and altered, perpetually refer to this ſettled law of inheritance, as a *datum*, or firſt principle univerſally known, and upon which their ſubſequent limitations are to work. Thus a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly underſtood without a previous knowledge of the law of deſcents in fee-ſimple. It may be perceived, that this is an eſtate confined in its deſcent, to ſuch heirs only of the donee as have ſprung, or ſhall ſpring from his body; but who thoſe heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldeſt, youngeſt, or other ſon alone, or all the ſons together, ſhall be his heir; this is a point, that we muſt reſult back to the ſtanding law of deſcents in fee-ſimple to be informed of[d].—Concerning fee-tail, more will be ſaid in the two ſubſequent ſections. A brief deſcription thereof, ſee p. 115.—In order to obtain a right conception of the law of deſcents in fee-ſimple, which will now be treated on alone, it will be neceſſary to obſerve the following rules:

THE firſt rule is, that inheritances ſhall lineally deſcend to the iſſue of the perſon laſt actually ſeiſed, *in infinitum*, or for ever; but ſhall never lineally aſcend. When therefore a perſon dies ſo ſeiſed, the inheritance firſt goes to his iſſue: as if there be A, B, and C, grandfather, father, and ſon; and B the father purchaſes land and dies; his ſon C ſhall ſucceed him as heir, and not A the grandfather; to whom the land ſhall never aſcend, but ſhall rather eſcheat to the lord[e].

THE ſecond rule is, that the male iſſue ſhall be admitted before the female. Thus ſons ſhall be admitted before daugh-

[c] Black. Com. 2 V. 209. [d] *Ibid.* 201. [e] Littleton, ſect. 3.

ters. As if A hath two ſons, C and D, and two daughters, E and F, and dies; firſt C, and (in caſe of his death without iſſue) then D, ſhall be admitted to the ſucceſſion in preference to both the daughters [f].

THE third rule is, that where there are two or more males in equal degree, the eldeſt only ſhall inherit; but the females all together. As if a man hath two ſons, A and B, and two daughters, C and D, and dies; A his eldeſt ſon ſhall alone ſucceed to his eſtate, in excluſion of B the ſecond ſon and both the daughters; but if both the ſons die without iſſue before the father, the daughters C and D ſhall both inherit the eſtate as co-parceners [g].

THE fourth rule is, that the lineal deſcendants, *in infinitum*, of any perſon deceaſed, ſhall repreſent their anceſtor; that is, ſhall ſtand in the ſame place as the perſon himſelf would have done had he been living. Thus the child, grandchild, or great grandchild (either male or female) of the eldeſt ſon, ſucceeds before the younger ſon, and ſo *in infinitum* [h]. And theſe repreſentatives ſhall take neither more nor leſs, but juſt ſo much as their principals would have done. As if there be two ſiſters, A and B, and A dies leaving ſix daughters, and then J. S. the father of the two ſiſters dies without other iſſue; theſe ſix daughters ſhall take among them exactly the ſame as their mother A would have done, had ſhe been living; that is, a moiety, or one half of the lands of J. S. in coparcenary: ſo that upon partition made, if the land be divided into twelve parts, B the ſurviving ſiſter ſhall have ſix thereof, and her ſix nieces the daughters of A one apiece [i].

THIS taking by repreſentation is called ſucceſſion *in ſtirpes*, according to the roots; ſince all the branches inherit the ſame ſhare that their root, whom they repreſent, would have done. For example, ſuppoſe the next heirs of *Titius* be ſix nieces, three by one ſiſter, two by another, and one by a third; his inheritance by the law of England will be divided into three parts, and diſtributed *per ſtirpes*, thus; one third to the three children who repreſent one ſiſter, another

[f] Hale's Hiſtory of the Common Law, 235. Black. Com. 2 V. 213.

[g] Hale, 238. Black. 2 V. 214.

[h] Hale, 236, 237. Black. 2 V. 216.

[i] Black. 2 V. 217.

third

third to the two who repreſent the ſecond, and the remaining third to the one child, who is the ſole repreſentative of her mother [k]. This mode of repreſentation is a neceſſary conſequence of the double preference given by our law, firſt to the male iſſue, and next to the firſt born among the males [l]. The iſſue of the eldeſt ſon excludes all other pretenders, as the ſon himſelf (if living) would have done; but the iſſue of two daughters divide the inheritance between them, provided their mothers, if living, would have done the ſame [m]. Among theſe ſeveral iſſues, or repreſentatives of the reſpective roots, the ſame preference to males, and the ſame right of primogeniture, or firſt birth obtain, as would have obtained at firſt among the roots themſelves, the ſons or daughters of the deceaſed. As if a man hath two ſons, A and B, and A dies, leaving two ſons, and then the grandfather dies; now the eldeſt ſon of A ſhall ſucceed to the whole of his grandfather's eſtate: and if A had left only two daughters, they ſhould have ſucceeded alſo to equal moieties, or halves of the whole, in excluſion of B and his iſſue. But if a man hath only three daughters, C, D, and E; and C dies leaving two ſons, D leaving two daughters, and E leaving a daughter and a ſon, who is younger than his ſiſter: here, when the grandfather dies, the eldeſt ſon of C ſhall ſucceed to one third, in excluſion of the younger; the two daughters of D to another third in partnerſhip; and the ſon of E to the remaining third, in excluſion of his eldeſt ſiſter. And the ſame right of repreſentation, guided and reſtrained by the ſame rules of deſcent, prevails downward *in infinitum* [n].

THE fifth rule is, that on failure of lineal deſcendants, or iſſue of the perſon laſt ſeiſed, the inheritance ſhall deſcend to the blood of the firſt purchaſor, ſubject to the three preceding rules. Thus, if G. S. purchaſes land, and it deſcends to J his ſon, and J dies ſeiſed thereof without iſſue, whoever ſucceeds to this inheritance muſt be of the blood of G. S. the firſt purchaſor of this family [o]. The firſt purchaſor is he who firſt acquired the eſtate to his family, whether the ſame was transferred to him by ſale, or by gift, or by any other method except only that of deſcent [p]. This is the principle

[k] Black. Com. 2 V. 217.
[l] *Ibid.* 218.
[m] Hale, H. C. L. 237, 238. Black. 2 V. 218.
[n] Black. 2 V. 218, 219.
[o] Hale, 217. 229. Black. 2 V. 220.
[p] Black. 2 V. 220.

upon

upon which the law of collateral inheritances depends; that upon failure of iſſue in the laſt proprietor, the eſtate ſhall deſcend to the blood of the firſt purchaſor [q]; or, that it ſhall reſult back to the heirs of the body of that anceſtor, from whom it either really has, or is ſuppoſed by fiction of law to have originally deſcended. As if A dies without iſſue, his eſtate ſhall deſcend to C his brother, who is lineally deſcended from D his next immediate anceſtor or father. On failure of brethren or ſiſters, and their iſſue, it ſhall deſcend to the uncle of A, the lineal deſcendant of his grandfather, and ſo on *in infinitum* [r].

HERE we muſt obſerve, that the lineal anceſtors, though (according to the firſt rule) incapable themſelves of ſucceeding to the eſtate, becauſe it is ſuppoſed to have already paſſed them, are yet the common ſtocks from which the next ſucceſſor muſt ſpring. And therefore the father, or other lineal anceſtor, is himſelf ſaid to be the heir, though long ſince dead, as being repreſented by the perſons of his iſſue; who are held to ſucceed not in their own rights, as brethren, uncles, &c. but in right of repreſentation, as the offſpring of the father, grandfather, &c. of the deceaſed. But though the common anceſtor be thus the root of the inheritance, yet with us it is not neceſſary to name him in making out the pedigree or deſcent. For the deſcent between two brothers is held to be an immediate deſcent; and therefore title may be made by one brother or his repreſentatives to or through another, without mentioning their common father. If G hath two ſons J and F, F may claim as heir to J, without naming their father G, and ſo the ſon of F may claim as couſin and heir to M the ſon of J, without naming the grandfather, *viz.* as ſon of F, who was the brother of J, who was the father of M. But though the common anceſtors are not named in deducing the pedigree, yet the law ſtill reſpects them as the fountains of inheritable blood: and therefore, in order to aſcertain the collateral heir of J, it is in the firſt place neceſſary to recur to his anceſtors in the firſt degree, and if they have left any other iſſue beſides J, that iſſue will be his heir. On default of ſuch, we muſt aſcend one ſtep higher to the anceſtors in the ſecond degree, and then to thoſe in the third and fourth, and ſo upwards *in infinitum*, till ſome anceſtor be found, who have other iſſue deſcending from

[q] Hale, H. C. L. 242, 243. Black. Com. 2 V. 223.

[r] Black. 2 V. 225.

them

them beſides the deceaſed, in a parallel or collateral line. From theſe anceſtors the heir of J muſt derive his deſcent; and in ſuch derivation the ſame rules muſt be obſerved with regard to ſex, primogeniture, and repreſentation, that have before been laid down with regard to lineal deſcent from the perſon of the laſt proprietor [s].

HERE again we muſt obſerve, in reſpect to collateral inheritances, that the heir need not be the neareſt kinſman abſolutely, but only *ſub modo*; that is, he muſt be the neareſt kinſman of the whole blood; for if there be a much nearer kinſman of the half blood, a diſtant kinſman of the whole blood ſhall be admitted, and the other entirely excluded [t].

A kinſman of the whole blood is he that is derived, not only from the ſame anceſtor, but from the ſame couple of anceſtors. As if the blood of J. S. was compoſed of thoſe of G. S. his father, and L. B. his mother, therefore his brother F, being deſcended from both the ſame parents, hath entirely the ſame blood with J. S. or he is his brother of the whole blood. But if after the death of G. S. L. B. the mother marries a ſecond huſband L. G. and hath iſſue by him; the blood of this iſſue, being compounded of the blood of L. B. (it is true) on the one part, but that of L. G. inſtead of G. S. on the other part, it hath therefore only half the ſame ingredients with that of J. S.; ſo that he is only his brother of the half blood, and for that reaſon they ſhall never inherit to each other. So alſo, if the father has two ſons, A and B, by different venters or wives; now theſe two brethren are not brethren of the whole blood, and therefore ſhall never inherit to each other, but the eſtate ſhall rather eſcheat to the lord [u]. Nay even if the father dies, and his lands deſcend to his eldeſt ſon A, who enters thereon, and dies ſeiſed without iſſue, ſtill B ſhall not be heir to this eſtate, becauſe he is only of the half blood to A, the perſon laſt ſeiſed; but, had A died without entry, then B might have inherited; not as heir to A his half-brother, but as heir to their common father, who was the perſon laſt actually ſeiſed [w].

[s] Black. Com. 2 V. 226.
[t] *Ibid.* 227.
[u] *Ibid.*
[w] Hale, H. C. L. 238. Black 2 V. 227.

IN

IN collateral inheritances the male ſtocks ſhall be preferred to the female (that is, kindred derived from the blood of the male anceſtors ſhall be admitted before thoſe from the blood of the female[x]) unleſs where the lands have, in fact, deſcended from a female[y]. Thus the relations on the father's ſide are admitted *in infinitum*, before thoſe on the mother's ſide are admitted at all; and the relations of the father's father, before thoſe of the father's mother, and ſo on[z]. Yet whenever the lands have notoriouſly deſcended to a man from his mother's ſide, this rule is totally reverſed, and no relation of his by his father's ſide, as ſuch, can ever be admitted to them; becauſe he cannot poſſibly be of the blood of the firſt purchaſor. And ſo, *e converſo*, if the lands deſcended from the father's ſide, no relation of the mother, as ſuch, ſhall ever inherit. So alſo if they in fact deſcended to J. S. from his father's mother C. K.; here not only the blood of L. B. his mother, but alſo of G. S. his father's father, is perpetually excluded. And, in like manner, if they be known to have decended from F. H. the mother of C. K. the line not only of L. B. and of G. S. but alſo of L. K. the father of C, is excluded[a]. Whereas when the ſide from which they deſcended is forgotten, or never known (as in the caſe of an eſtate newly purchaſed to be holden *ut feudum antiquum*, or as a feud of indefinite antiquity; as all the eſtates held in fee-ſimple throughout the kingdom are held[b]), the right of inheritance runs up all the father's ſide, with a preference to the male ſtocks in every inſtance; and if it finds no heirs there, it then, and then only, reſorts to the mother's ſide, leaving no place untried, in order to find heirs that may, by poſſibility, be derived from the original purchaſor. The greateſt probability of finding ſuch was among thoſe deſcended from the male anceſtors; but upon failure of iſſue there, they may poſſibly be found among thoſe derived from the females[c].

FROM what has been here ſaid, the reader may form an idea of the law of deſcents in fee-ſimple; and for a more full and perſpicuous view thereof, I muſt refer to the learned authors here cited, eſpecially to the commentaries of judge Blackſtone; where I need not ſay this ſubject is amply treated

x Hale, H. C. L. 241. Black. Com. 2 V. 234.
y Black. 2 V. 234.
z Hale, 242. Black. 2 V. 334.
a Black. 2 V. 236.
b *Ibid.* 222.
c *Ibid.* 236.

on,

on, as it is well known, that book being in the hands of moſt of the profeſſion of the law, as well as of many of the nobility and gentry throughout the kingdom; on which account, and for its repute and authenticity, I have ſo frequently cited it, inſtead of other authors.

As to the heir, he is much favoured by the law; as not being liable to pay any ſimple contract debts due from the deceaſed, not even if the eſtate was purchaſed with the money for which the ſimple contract debts are due[d]. And in caſe the eſtate is mortgaged, if the deceaſed have left enough perſonal eſtate to diſcharge all his debts, the real eſtate muſt be redeemed for the benefit of the heir[e]. But where the deceaſed has not left a ſufficiency of perſonal eſtate to diſcharge all his debts, the real eſtate will be liable to anſwer thoſe due by bonds and ſpecial contracts, whereby he hath bound himſelf and his heirs; and that whether it comes to the heir by deſcent, or is given to him or any other by will: and this will be real *aſſets*, or *aſſets* by deſcent, as has been mentioned[f].—By the ſtatute of the 3 W. & M. c. 14. it is enacted, that all wills and teſtaments, limitations, diſpoſitions, or appointments, of or concerning any manors, meſſuages, lands, tenements, or hereditaments; or of any rent, profit, term, or charge, out of the ſame, whereof any perſon at the time of his deceaſe ſhall be ſeiſed in fee-ſimple, in poſſeſſion, reverſion, or remainder, or hath power to diſpoſe of the ſame by his laſt will and teſtament; ſhall be deemed and taken to be fraudulent, and abſolutely void and of none effect, againſt ſuch perſons, their heirs, ſucceſſors, executors, adminiſtrators, and aſſigns, to whom the deceaſed ſhall, by bonds or other ſpecialties, have bound himſelf and his heirs: and all ſuch creditors may have and maintain actions of debt upon their bonds and ſpecialties, againſt the heir at law of the obligor and ſuch deviſee jointly. Yet it is provided, that, where there ſhall be any limitation or appointment, deviſe or diſpoſition, of or concerning any manors, meſſuages, lands, tenements, or hereditaments, for the raiſing or payment of any real or juſt debts; or any portions or ſums of money for any child or children of any perſon, other than the heir at law, *according to any marriage contract or agreement in writing*, bona fide *made before ſuch marriage*, the ſame ſhall be in full force; and the ſame manors, meſ-

[d] Black. Com. 3 V. 430.
[e] 2 Salk. 449. 1 Vern. 436.
[f] Pag 45.

ſuages,

ſuages, lands, tenements, and hereditaments, ſhall be holden and enjoyed by every ſuch perſon, his heirs, executors, adminiſtrators, and aſſigns, for whom the ſaid limitation, appointment, deviſe, or diſpoſition was made, and by his truſtee or truſtees, their heirs, executors, adminiſtrators, and aſſigns, for ſuch eſtate or intereſt as ſhall be limited or appointed, deviſed or diſpoſed, until ſuch debt or portion ſhall be raiſed and paid.—Where any heir at law ſhall be liable to pay the debt of his anceſtor, in regard of any lands, tenements, or hereditaments deſcending to him, and ſhall ſell, alien, or make over the ſame, before any action brought or proceſs ſued out againſt him; it is enacted, that ſuch heir at law ſhall be anſwerable for ſuch debt, in an action of debt, to the value of the land ſo by him ſold, aliened, or made over; in which caſe all creditors ſhall be preferred, as in actions againſt executors and adminiſtrators, and ſuch execution ſhall be taken out upon any judgment ſo obtained againſt ſuch heir, to the value of the ſaid land, as if the ſame were his own proper debt; ſaving that the lands, tenements, and hereditaments *bona fide* aliened before the action brought, ſhall not be liable to ſuch execution.

SECTION THE SECOND.

HOW THE LAW DISPOSES OF A WIFE'S REAL ESTATE: OR THE LAW CONCERNING A TENANCY BY THE CURTESY OF ENGLAND.

WHERE a man taketh a wife ſeiſed of an eſtate in fee-ſimple, or fee-tail, and hath iſſue by her; although the iſſue afterward die or live, the huſband ſhall hold the land during his life, as tenant by the curteſy of England [a]. To make a tenancy by the curteſy, theſe four requiſites are neceſſary; marriage, ſeiſin of the wife, iſſue and death of the wife. 1. The marriage muſt be canonical and legal. 2. The ſeiſin of the wife, which muſt be an actual ſeiſin or poſſeſſion of the lands; not a bare right to poſſeſs, which is a ſeiſin in law, but an actual poſſeſſion, which is a ſeiſin in deed: therefore a man ſhall not be tenant by the curteſy of a remainder or reverſion [b]. But entry is not always neceſſary to give ſeiſin in deed; for if the land is in leaſe for years, curteſy may be without entry or even receipt of rent, the poſſeſſion of the leſſee for years being deemed the poſſeſſion of

[a] Co. Litt. 29. [b] Black. Com. 2 V. 127.

huſband

huſband and wife[c]. And of ſome hereditaments a man may be tenant by the curteſy, though there have been no actual ſeiſin of the wife; as in the caſe of an advowſon, where the church has not become void in the lifetime of the wife; which a man may hold by curteſy, becauſe it is impoſſible to have had actual ſeiſin of it, and *impotentia excuſat legem*[d], or impotency excuſeth the law. And though, in ſtrictneſs of law, there cannot be curteſy of truſts; yet the courts of equity have allowed curteſy both of truſts and other intereſts, which, though in law mere rights and titles, are deemed eſtates in equity. However, a wife, in point of benefit, may have a truſt of inheritance which may be ſo declared as to prevent curteſy, as by directing the profits during the wife's life to be paid to her ſeparate uſe[e]. — If the wife be an ideot, the huſband ſhall not be tenant by the curteſy of her lands; for the king, by prerogative, is intitled to them, the inſtant ſhe herſelf has any title[f].—3. The iſſue muſt be born alive. Some have had a notion that it muſt be heard to cry; but that is a miſtake[g]; crying indeed is the ſtrongeſt evidence of its being born alive, but it is not the only evidence[h]. The iſſue muſt alſo be born during the life of the mother; for, if the mother dies in labour, and the Cæſarean operation is performed, the huſband, in this caſe, ſhall not be tenant by the curteſy; becauſe, at the inſtant of the mother's death, he was clearly not intitled, as having had no iſſue born, but the land deſcended to the child, while he was yet in his mother's womb; and the eſtate, being once ſo veſted, ſhall not afterwards be taken from him[i]. The iſſue that muſt be ſo born alive, as has been obſerved, muſt alſo be capable of inheriting the mother's eſtate[k]. Wherefore, if a woman be tenant in tail *male*, and hath only a daughter born, the huſband is not thereby intitled to be tenant by the curteſy; becauſe ſuch iſſue female can never inherit the eſtate in tail male: and if a woman be delivered of a monſter, which hath not human ſhape, he is not capable of inheriting; yet, if he hath human ſhape, though deformed in body, he is capable[l]. The time when the iſſue was born is immaterial, provided it is born during the coverture; for whether it be born before or after the wife's ſeiſin of the lands, whether it be living or dead at the time of the ſeiſin, or at the time of the wife's deceaſe, the huſband ſhall be tenant by the curteſy[m].—4. By the

c Co. Litt. 29. Note 3. 13 Edit.
d Black. Com. 2 V. 127.
e Co. Litt. 29. Note 6. 13 Edit.
f Black. Com. 2 V. 127.
g *Ibid.*
h 8 Co. Rep. 34.
i Co. Litt. 29.
k Black. Com. 2 V. 128.
l Co. Litt. 29.
m *Ib.d.*

death

death of the wife (after iſſue had as before obſerved) the huſband becomes tenant by the curteſy, and not before[n]. Yet by the birth of a child, he becomes tenant by the curteſy *initiate*, and may do many acts to charge the lands, but his eſtate is not *conſummate* till the death of the wife[o].

BY becoming tenant by the curteſy, the huſband is intitled to hold the eſtate during his life, and immediately after his death the ſame muſt inevitably go to the heir, whether he be a child or diſtant relation of the wife; and this the huſband, as being only tenant by the curteſy, can in no wiſe prevent; for he cannot alien this eſtate for any longer term than his own life: wherefore, and for that it may ſo happen, the huſband, on the death of the wife, may have no further benefit from the eſtate, of which during his wife's life he hath been intitled to the rents and profits; a tenancy by the curteſy ſeldom happens, where the wife is ſeiſed in fee-ſimple at any time during her coverture; for although ſhe cannot deviſe this eſtate by will, as being reſtrained by the ſtatute of 34 & 35 Hen. VIII. c. 5. neither will the law permit her to convey it to her huſband or any other perſon whatever. For all deeds executed, and acts done by her during her coverture, are void; except it be a fine, or like matter of record, in which caſe ſhe muſt be ſolely and ſecretly examined, to learn if her act be voluntary[p]. Yet by a fine, in which ſhe and her huſband muſt join, the eſtate may be conveyed and aſſured to any perſon or perſons, for ſuch uſes and purpoſes as the huſband and wife ſhall think fit. So likewiſe may ſuch eſtate whereof the wife is ſeiſed in fee-tail general.

SECTION THE THIRD.

HOW THE LAW DISPOSES OF AN HUSBAND'S REAL ESTATE: OR THE LAW CONCERNING A TENANCY IN DOWER.

THE wife is intitled by law to be endowed of one-third part of all ſuch lands and tenements, of which her huſband was ſeiſed in fee-ſimple or fee-tail, at any time during the coverture or marriage; to hold the ſame during the term of her natural life[q]. But that ſhe may be intitled thereto,

[n] Co. Litt. 30.
[o] Black. Com. 2 V. 128.
[p] *Ibid.* 1 V. 444.
[q] Co. Litt. 31.

ſhe

ſhe muſt be the wife of the party at the time of his deceaſe; for if ſhe be divorced *a vinculo matrimonii*, that is, from the band of matrimony, ſhe ſhall not be endowed; for *ubi nullum matrimonium ibi nulla dos*, that is, where there is no marriage there is no dower. But a divorce *à menſa et thoro*, or from bed and board only, doth not deſtroy the dower; not even if it is for adultery itſelf, by the common law [r]. But by the ſtatute 13 Edw. I. c. 34. if a woman elopes from her huſband, and lives with an adulterer, ſhe ſhall loſe her dower, unleſs her huſband be voluntarily reconciled to her. And the widows of traitors, or perſons attainted of treaſon, are barred of their dower (except in the caſe of certain modern treaſons relating to the coin [s]); but not the widows of felons [t]. An alien (one born out of the King's allegiance) cannot be endowed, unleſs ſhe be queen conſort; for no alien is capable of holding lands. And that the wife may be endowed, ſhe muſt be above nine years old at her huſband's death, otherwiſe ſhe ſhall not be endowed [u].

THE wife being intitled by law to be endowed of one-third part of all ſuch lands and tenements of which her huſband was ſeiſed in fee-ſimple or fee-tail, at any time during the coverture or marriage, ſhall hold ſuch one-third part during the term of her natural life; and that whether ſhe hath iſſue by her huſband or not [w], provided any iſſue which ſhe might have had, might by poſſibility have been heir. Therefore, if a man ſeiſed in fee-ſimple hath a ſon by his firſt wife, and after marries a ſecond wife, ſhe ſhall be endowed of his lands; for her iſſue might by poſſibility have been heir on the death of the ſon by the former wife. But, if there be a donee in ſpecial tail, who holds lands to him and the heirs of his body begotten on Jane his wife: though Jane may be endowed of thoſe lands, yet if Jane dies, and he marries a ſecond wife, that ſecond wife ſhall never be endowed of the lands entailed; for no iſſue that ſhe could have, could by any poſſibility inherit them [x]. A ſeiſin in law (that is, a right to poſſeſs) of the huſband, will be as effectual as a ſeiſin in deed, which is an actual poſſeſſion [y], in order to render the wife dowable; for it is not in the wife's power to bring the huſband's title to an actual ſeiſin [z]. Yet the ſeiſin of the huſband for a tranſitory inſtant only, when the ſame act which gives him the eſtate conveys it alſo out of him again

[r] Co. Litt. 32.
[s] Stat. 5 Eliz. c. 11. 18 Eliz. c. 1.
[t] Black. Com. 2 V. 131.
[u] Co. Litt. 31.
[w] *Ibid.*
[x] Black. Com. 2 V. 131.
[y] *Ibid.* 127.
[z] Co. Litt. 31.

(as where by a fine land is granted to a man, and he immediately renders it back by the ſame fine), ſuch a ſeiſin will not entitle the wife to dower [a]: for the land was merely *in tranſitu*, and never reſted in the huſband. But if the land abides in him for a ſingle moment, it ſeems that the wife ſhall be endowed thereof. This doctrine was extended very far by a jury in Wales, where the father and ſon were both hanged in one cart, but the ſon was ſuppoſed to have ſurvived the father, by appearing to ſtruggle longeſt; whereby he became ſeiſed of an eſtate by ſurvivorſhip, in conſequence of which ſeiſin his widow had a verdict for her dower [b]. A widow may be endowed of all her huſband's lands, tenements, and hereditaments, corporeal or incorporeal, under the reſtrictions before mentioned, unleſs there be ſome ſpecial reaſon to the contrary. Thus, a woman ſhall not be endowed of a caſtle built for defence of the realm, becauſe it ought not to be divided. But of a caſtle that is only for the private uſe and habitation of the owner, a woman ſhall be endowed [c]. So a woman ſhall not be endowed of a common without ſtint; for as the heir would then have one portion of this common, and the widow the other, and both without ſtint, the common would be doubly ſtocked. But a woman ſhall be endowed of a common certain; and ſo of other incorporeal hereditaments; as rent, rent-ſervice, rent-charge, and rent-ſeck [d], mentioned in this and a former chapter [e].——Though curteſy out of a truſt is allowed, as was mentioned in the former part of the foregoing ſection; yet dower has been refuſed thereout; a partiality not eaſy to be reconciled with reaſon, however ſettled by the current of authorities [f].——Where dower is allowable, it matters not though the huſband alien or ſell the lands during the coverture; for he aliens them liable to dower [g], of which the wife cannot be barred but by a fine, or like matter of record, to which ſhe muſt be privy, and privately examined: wherefore, and for ſaving the expence of a fine, it is common where the eſtate is but of ſmall value, for the huſband when he conveys it, to bind himſelf by a bond, to ſave harmleſs and keep indemnified the purchaſer, againſt any claim that might afterwards be made for or in reſpect of dower. Yet as there is no method of effectually barring the wife but by a fine, or like matter of record, the bond can be but of little uſe if the obligor ſhould die inſolvent; ſo that it behoves the purchaſer, in caſe he takes

a Co. Litt. 31.
b Black. Com. 2 V. 132.
c Co Litt. 31.
d *Ibid.* 32.
e Pag. 24. 86
f Co. Litt. 29. Note 6. 13 Edit.
g *Ibid.* 32.

a bond

a bond inſtead of having a fine paſſed, to look well to the probability of the obligor's dying ſolvent, and leaving a ſufficiency to diſcharge the bond, in caſe dower ſhould be demanded.

BUT it now ſeldom happens that the wife has any claim to dower; for not only upon moſt preconcerted marriages, where a ſettlement is made purſuant to the ſtatute of 27 Hen. VIII. c. 10. and thereby ſhe is barred by a jointure made to her in lieu thereof, but when a man purchaſes an eſtate in fee-ſimple, it is uſual for him, in order to prevent his wife having any claim of dower therefrom, and to ſave the expence of a fine in caſe he ſhould ſell it, to have the eſtate conveyed to him in joint tenancy, which is uſually done in manner following; as for example, ſuppoſe A. B. to be the grantor, C. D. the grantee who purchaſes this eſtate, and E. F. a friend of C. D. the grantee. Now, in conſideration of the ſum agreed for by C. D. to be given to A. B. for this eſtate, and in conſideration of 5s. a piece paid by the ſaid C. D. and E. F. the ſaid A. B. ſells and aliens this eſtate to C. D. and E. F. TO HOLD, unto the ſaid C. D. and E. F. and their heirs, to the uſe of the ſaid C. D. and E. F. and the heirs of the ſaid E. F. In truſt nevertheleſs, as to the eſtate and intereſt of the ſaid E. F. and his heirs, to the only proper uſe and behoof of the ſaid C. D. his heirs and aſſigns for ever, and to and for no other uſe, truſt, intent, or purpoſe whatſoever. So by this means C. D. the purchaſer, takes this eſtate in joint-tenancy with E. F. though E. F. has no other intereſt therein than as a truſtee for C. D.; yet as the eſtate is conveyed to C. D. and E. F. in joint-tenancy, the wife of C. D. can have no claim or title to dower therefrom; and C. D. can ſell and ſafely convey this eſtate to a purchaſer, without paſſing a fine to bar his wife of dower.

HERE we may obſerve what has been mentioned concerning the deſcent of eſtates held in fee-ſimple, and how the law diſpoſes thereof, and of thoſe held in fee-tail, that this is conſiſtent with the general law of the land. But particular counties, cities, towns, manors, and lordſhips, being indulged with the privilege of abiding by their own cuſtoms; which privilege is confirmed to them by ſeveral acts of parliament; thoſe cuſtoms prevail in contradiſtinction to the reſt of the nation at large[h]. Of thoſe cuſtoms is the cuſtom of gavel-kind, chiefly ſubſiſting in Kent, though it is to be found in other parts of the kingdom[i]. By this cuſtom, not only the eldeſt ſon of the father ſhall ſucceed to his inheritance, but all the ſons alike[k].

[h] Black. Com. 1 V. 74.
[i] *Ibid.*
[k] Co. Litt. 175.

And though the anceſtor may be attainted and hanged, yet the heir ſhall ſucceed to his eſtate without any eſcheat to the lord[l]. And by this cuſtom the huſband ſhall be tenant by the curteſy without having any iſſue[m]; yet curteſy by the cuſtom of gavel kind, is ſubject to ſeveral diſadvantages; for it is only a moiety of the wife's land, and it ceaſeth if the huſband marries again[n]. — By the ſtatute 31 Hen. VIII. c. 3. a great part of Kent is made deſcendable to the eldeſt ſon, according to the courſe of the common law; as by means of that cuſtom divers ancient and great families, after a few deſcents came to very little or nothing[o]. And there are ſix other ſtatutes for diſgavelling particular lands in Kent, beſides the 31 Hen. VIII. though that is the only ſtatute in print. Thoſe are mentioned in Mr. Robinſon's book on gavel kind[p]. —— Another of thoſe cuſtoms is the cuſtom that prevails in divers ancient boroughs, and therefore called borough-engliſh, whereby the youngeſt ſon ſhall inherit the eſtate in preference to his elder brothers[q]. And there is a cuſtom in other boroughs that a widow ſhall be entitled for her dower to all her huſband's lands; whereas by the common law ſhe ſhall be endowed of one third part only[r]. Likewiſe there are ſpecial and particular cuſtoms of manors, of which every one has more or leſs, and which bind all the copy-hold and cuſtomary tenants that hold of the ſaid manors[s]. Some copy-holders are for lives, one, two, or three ſucceſſively; and ſome inheritances from heir to heir by cuſtom; and cuſtom ruleth thoſe eſtates wholly, both for widows eſtates, fines, heriots, forfeitures, and all other things[t]. —— The cuſtoms that prevail in the city of London and province of York, which comprehend ſo conſiderable a part of the kingdom, will be the ſubject of the enſuing chapter.

[l] Black. Com. 1 V. 74. 2 V. 84.

[m] Co. Litt. 30.

[n] *Ibid.* Note 1. 13 Edit. Refers to Robinſ. Gavelk. b. 2. c. 1. and ſays "There the learned author ſuggeſts, "that ſome have doubted, whether "there is any ſuch variance between "the common law and the cuſtom, and "therefore undertakes to prove it by "authorities on record."

[o] Co. Litt. 140.

[p] Robinſ. on Gavelk. 75.

[q] Black. Com. 1 V. 75.

[r] *Ibid.*

[s] *Ibid.*

[t] Bacon's Law Tracts, 137.

CHAP. V.

The Cuſtoms of the City of London and Province of York.

SECTION THE FIRST.

WHEREIN THE CUSTOMS OF LONDON AND YORK AGREE, AND WHEREIN THEY VARY.

WHAT thoſe cuſtoms are within the city of London and province of York, which comprehend ſo large and conſiderable a part of the kingdom, it is ſomewhat ſtrange, ſays Dr. Burn, that ſo few authors have taken any pains to inform their readers or themſelves; and that thoſe cuſtoms are ſo ancient, and of ancient times were of ſuch general and almoſt univerſal extent, that ſome of the greateſt lawyers have doubted whether they were not part of the common law[a]. Formerly, not only in the province of York and city of London, but in moſt, if not in all parts of England, a man was reſtrained from bequeathing the whole of his perſonal eſtate away from his wife and children; but the law in that particular is now altered, though it continued in the province of York, the principality of Wales, and in the city of London, later than in other parts of the kingdom, and till very modern times; when in order to favour the power of bequeathing, and to reduce the whole kingdom to the ſame ſtandard, three ſtatutes were provided, the one 4 & 5 W. & M. c. 2. explained by 2 & 3 Ann. c. 5.[b] for the province of York; another 7 & 8 W. III. c. 38. for Wales; and a third 11 Geo. I. c. 18. for London: whereby it is enacted, that perſons within thoſe diſtricts, and liable to thoſe cuſtoms, may (if they think proper) diſpoſe of all their perſonal eſtates by will; and the claims of the widows children

[a] Eccleſ. Law, 4 V. 368.

[b] This ſtatute of 2 & 3 Ann. recites, that a proviſo was contained in the ſtatute 4 W. & M. that nothing therein contained ſhould extend to the citizens of the City of York; and that the mayor and commonalty, on behalf of the inhabitants of the ſaid city, had requeſted that the ſaid proviſo might be repealed. And by the ſtatute 2 & 3 Ann. it is enacted that the ſaid proviſo, as far as the ſame concerned the citizens of the city of York, ſhall be repealed; ſo that it ſhall be lawful for all and every the citizens of the city of York, who ſhall be freemen of the ſaid city, inhabiting therein, or within the ſuburbs thereof, by their laſt wills and teſtaments, to diſpoſe of their goods, chattels, and other perſonal eſtate, to ſuch perſons as they ſhall think fit, as any other perſons inhabiting within the province of York, may lawfully do by virtue of the ſtatute 4 W. & M.

and other relations to the contrary are totally barred. So that now, throughout all the kingdom of England, a man may deviſe the whole of his chattels as freely as he formerly could any part thereof[c]. But in caſe of inteſtacy, the ſtatute of diſtribution expreſly excepts and reſerves the cuſtoms of the city of London and province of York. So that although the reſtraint of deviſing is removed by the ſtatutes juſt mentioned, yet the ancient cuſtoms of London and York remain in full force with reſpect to the eſtates of inteſtates[d]. And by the cuſtom of the city of London, there is ſtill a difference to what it is in moſt other parts of the kingdom in reſpect to the diſpoſing the care of children[e]: as by ſtatute 12 Car. II. c. 24. any father under age, or of full age, may by deed or will diſpoſe of the cuſtody of his child, either born or unborn, to any perſon, except a popiſh recuſant[f], either in poſſeſſion or reverſion, till ſuch child attains the age of twenty-one years. But if the father is a freeman of London, he cannot deviſe the diſpoſition of the body of his child; and if he doth, yet the infant ſhall remain in the cuſtody of the mayor and aldermen[g], who are guardians to the children of all freemen of London that are under the age of twenty-one at the time of their father's deceaſe[h]. So that if a freeman or freewoman die, leaving orphans within age unmarried, the court of orphans, which is held by cuſtom time out of memory, before the lord mayor and aldermen of the city of London, ſhall have the cuſtody of their body and goods; and the executors or adminiſtrators ſhall exhibit inventories before them, and become bound to the chamberlain to the uſe of the orphans, to make a true account upon oath; and if they refuſe, they may be committed till they become bound[i]: And their being bound in the ſpiritual court doth not excuſe them from this cuſtom[k], as they may ſtill be compelled to give other ſecurity to the chamber of London[l]. And if any perſon intermarry with an orphan, without the conſent of the court, ſuch perſon may be fined by them, according to the quality and portion of the orphan; and unleſs ſuch perſon pay the fine, or give ſecurity to pay it, they may commit him to

c Black. Com. 2 V. 493.
d *Ibid.* 518.
e Co. Litt. 88.
f Popiſh recuſants, are thoſe convicted in a court of law of not attending the ſervice of the church of England, and are thereby ſubject to divers penalties; or thoſe refuſing to make the declaration againſt popery, as enjoined by the ſtatute 30 Car. II. c. 2. when tendered by the proper magiſtrate, by which they are alſo ſubject to divers diſabilities. Black. Com. 4 V. 56.
g Priv. Lond. 287.
h *Ibid.* 288.
i *Ibid.* 280. 287.
k Law of Exec. 252.
l 1 Roll's Abr. 550.

Newgate,

Newgate, to remain there till he ſubmit to their orders [m]. A peer has no privilege for taking and marrying an orphan of London without licence [n].——He that marries an orphan without conſent of the court, muſt make a jointure before he receives the portion [o].——Upon the marriage of orphans, the cuſtom is to appoint the common ſerjeant to treat and take ſecurity for the orphan [p].

As to inteſtacy, in the main the cuſtoms of London and York agree; but there are ſome variations, and in two principal points they conſiderably differ. The one is, that in London the ſhare of the children (or orphanage part) is not fully veſted in them till the age of twenty-one, before which they cannot diſpoſe of it by teſtament [q]; and if they die under that age, whether ſole or married, their ſhare ſhall ſurvive to the other children [r]. The other is that in the province of York; the heir at common law, who inherits any land, either in fee-ſimple or fee-tail, is excluded from any filial portion or reaſonable part [s].—— As thoſe variations will appear more conſpicuous hereafter, we ſhall now proceed to take a view of thoſe cuſtoms under two diſtinct heads.

SECTION THE SECOND.

THE CUSTOMS OF THE CITY OF LONDON AS TO INTESTACY.

IF a freeman of London dies in London, or elſewhere, *inteſtate*, and though his eſtate doth not lie in the city, but elſewhere, his children are entitled to their ſhare of his perſonal eſtate by the cuſtom [t]. And if the freeman dies, leaving a widow and a child or children; his perſonal eſtate (after his debts are paid, and the cuſtomary allowance for his funeral, and for the widow's chamber [u] are deducted thereout) is by the cuſtom of the city, to be divided into

m Priv. Lond. 282, 283.
n Lev. 163.
o Priv. Lond. 286.
p Laws of Lond. 67.
q 2 Vern. 558.
r Prec. Cha. 537.
s Swinb. 231.
t Priv. Lond. 288.
u The widow's apparel, and furniture of her bedchamber, in London, is called the widow's chamber. Black. Com. 2 V. 518. In a caſe before lord Parker, it was ſaid that the widow is intitled to the furniture of her chamber; or, in caſe the eſtate exceeds two thouſand pounds, then to fifty pounds inſtead thereof. Caſe of Briddle and Briddle, 7 Vin. Abr. 200.

three equal parts, and diſpoſed of in the following manner: to wit, one-third part thereof to the widow, another third part to the children, and the other third part (being taken out of the cuſtom) is now, by the ſtatute 1 Jac. II. c. 17. made ſubject to the ſtatute of diſtribution; and ſo dividing the whole into nine parts, four ninths belong to the wife, and five ninths to the children[w]. And if a man dies worth 1800l. leaving a widow and two children, the eſtate ſhall be divided into eighteen parts, whereof the widow ſhall have eight, ſix by the cuſtom, and two by the ſtatute, and each of the children five, three by the cuſtom, and two by the ſtatute: if he leaves a widow and one child, ſhe ſhall ſtill have eight parts as before, and the child ſhall have ten, ſix by the cuſtom, and four by the ſtatute[x]. And if there ſhould be an after born child, ſuch child will come in with the reſt for a cuſtomary ſhare of the father's perſonal eſtate[y]. If the freeman leaves a widow, and no child, the widow ſhall have three-fourths of the whole; two by the cuſtom, and one by the ſtatute, and the remaining fourth ſhall go by the ſtatute to the next of kin[z]. If he hath no wife, but hath children, the half of his perſonal eſtate belongs to his children, and the other half (being, as it is called, the dead man's part; becauſe formerly the ordinary, or he to whom the ordinary committed adminiſtration, was to diſpoſe of the ſame to pious uſes for the benefit of the deceaſed's ſoul) is now diſtributable amongſt the children by the ſtatute[a]. And if he hath neither wife nor child at the time of his death; then the whole belongs to the deceaſed, and is diſtributable by the ſtatute[b]. As to the freeman's grandchildren, the cuſtom does not extend to theſe, as hath been determined in ſeveral caſes[c].

WE may now obſerve what ſituation the widow muſt be in at the time of her huſband's death, that ſhe may be intitled to his perſonal eſtate; as, whether there is any ſettlement whereby ſhe may be barred of her cuſtomary part, or the part ſhe may be intitled to under the ſtatute of diſtributions; and alſo the ſituation the children muſt be in that they may be intitled; as, whether any of them have been advanced, ſo as thereby to be barred in part or in whole of what they would otherwiſe be intitled to: which, after being conſidered, more will be ſaid concerning the diſtribution.

w 2 Salk. 426. L. Raym. 1328. 1 Vern. 180.
x Black. Com. 2 V. 518.
y Prec. Cha. 499.
z Black. Com. 2. V. 519.
a 1 P. Will. 341.
b Law of Teſt. 196.
c 1 Vern. 397. 1 P. Will. 341. 2 Salk. 426.

IF

IF the wife be provided for by a jointure before marriage, in bar of her cuſtomary part, it puts her in a ſtate of non-entity with regard to the cuſtom only; but ſhe ſhall be intitled to her ſhare of the dead man's part under the ſtatute of diſtributions, unleſs barred by ſpecial agreement [d]; and if a freeman of London makes a jointure on his intended wife, and the ſame is expreſſed to be in bar only of her dower, or thirds of lands, tenements, and hereditaments, this ſhall not bar her of her cuſtomary ſhare of his perſonal eſtate [e]: yet it is otherwiſe, if it is ſaid to be in bar of her cuſtomary part [f]. In reſpect to the part ſhe will be intitled to under the ſtatute of diſtributions; where a freeman whoſe wife has been compounded with dies inteſtate, his widow ſhall have ſuch part as ſhe is intitled to under the ſtatute of diſtributions, if there are no expreſs words in the agreement to exclude her [g]: but where a widower and widow being about to intermarry, and having only perſonal eſtate; by articles made before marriage, agreed, that in caſe the huſband ſurvived, he ſhould have two thouſand pounds only of his wife's perſonal eſtate, and the reſt to be at her diſpoſal, &c. and in caſe the wife ſurvived, then ſhe was to have two thouſand pounds out of the huſband's perſonal eſtate, without ſaying *only or no more*. The huſband, being a freeman of London, died; and his wife brought her bill for an account of his perſonal eſtate over and above the two thouſand pounds, and ſo to be let into the cuſtomary ſhare thereof; but it was decreed, that the equitable conſtruction of thoſe articles muſt be to exclude the wife from any further ſhare out of the eſtate; and, though the words were not ſo full to exclude her, yet the intent of the articles appearing to be a mutual reciprocal agreement between them for ſettling each other's claim, ought not to be extended larger on one ſide than the other, and decreed that the wife muſt have only the two thouſand pounds [h].—— Where a freeman of London, who was a widower, and had ſeveral children, being poſſeſſed of a conſiderable leaſehold eſtate, on a ſecond marriage conveys theſe leaſes in conſideration of 2000l. portion in truſt for himſelf for life, remainder to his wife for life, *in lieu and bar of all dower, cuſtomary eſtate*, &c. remainder to the firſt ſon of that marriage, and ſo to every other ſon; and in the ſettlement there was an

[d] Black. Com. 2 V. 519.
[e] Eq. Caſ. Abr. 158, 159.
[f] 3 P. Will. 530.
[g] Prec. Cha. 327.
[h] Laws of Lond. 102.

agreement

agreement that the truſtees ſhould ſell thoſe leaſes, and inveſt the money in the purchaſe of lands of inheritance to be ſettled to the uſes aforeſaid; but the huſband died before any purchaſe made, and it was held that the wife was barred from claiming any other part of the perſonal eſtate [j]. And where a ſettlement was made on the wife of a citizen, of part of the perſonal eſtate of the huſband, in bar and ſatisfaction of all her claim and demand out of his perſonal eſtate, *by the cuſtom or otherwiſe*, and the huſband died inteſtate; it was decreed that the wife was barred of her diſtributive ſhare of his eſtate by the ſtatute of diſtributions [k].

HENCE we may perceive, that if there are ſufficient words in a ſettlement made previous to marriage, the freeman's wife will be barred of the claim ſhe might otherwiſe have to her huſband's perſonal eſtate, either by the cuſtom or by the ſtatute of diſtributions; in conſequence of which it will be as if there were no wife, and the children will have one half by the cuſtom, and the other half by the ſtatute [l]. And if the wife be divorced for adultery, ſhe ſhall not have her cuſtomary ſhare [m].

IF any of the children are advanced by the father in his lifetime with any ſum of money (not amounting to their full proportionable part), they ſhall bring that portion into hotchpot with the reſt of the brothers and ſiſters, but not with the widow, before they are intitled to any benefit under the cuſtom; but if they are fully advanced, the cuſtom intitles them to no further dividend [n].—The advancement muſt be of money or perſonal eſtate; for the cuſtom extends only to the perſonal eſtate of a freeman; becauſe when it firſt began, the citizens of London had no regard at all to a real eſtate, as they did not ſuppoſe any freeman of London would purchaſe ſuch eſtate, but would employ his whole fortune and ſtock in trade for the benefit of commerce [o]. So a ſettlement of a real eſtate on a child is no advancement, nor to be brought into hotchpot [p]; and if a citizen conveys to a child land of inheritance, though it be expreſſed for advancement, it bars no child's part; but ſuch may come in for a ſhare of the perſonal

[j] Eq. Caſ. Abr. 153.
[k] Caſe of Badcock and Stanhope, 7 Vin. Abr. 211.
[l] 1 P. Will. 644. 2 P. Will. 527.
[m] Bunb. 16.
[n] Black. Com. 2 V. 519.
[o] Abr. Eq. Caſ. 150.
[p] 2 Cha. Caſ. 160.

eſtate with the reſt[q]. And it has been certified, that where an heir or co-heir had a real eſtate ſettled on him or her, the ſame was out of the cuſtom of the city of London; and though the father ſhould afterwards declare it to be a full advancement for ſuch child, yet that was no bar to his orphanage part; neither was it to be brought into hotchpot, but was clearly out of the cuſtom[r]. And where money was given by the father to be laid out in land to be ſettled on the ſon and the intended wife for their lives, with remainders in tail; and the queſtion was, whether this ſhould be reckoned to be an advancement by part of the perſonal eſtate of the father, ſo as the ſon ought to bring the ſame into hotchpot, to entitle him to a ſhare of the perſonal eſtate? it was held by the lord chancellor, that this money was not to be reckoned as part of the perſonal eſtate[s].

How this advancement is to be beſtowed, and what ſhall be deemed an advancement either in part, ſo that the child muſt bring the ſame into hotchpot before he be intitled to any benefit under the cuſtom; or in whole, ſo as thereby the child will be excluded from having any further portion, ſeems to have been much queſtioned. Though it is ſaid, generally, by a late author, that any proviſion made by the father in his lifetime for his children, is advancement within the cuſtom; but that a ſettlement of a real eſtate on a child is no advancement, nor to be brought into hotchpot[t]. Yet ſmall inconſiderable ſums occaſionally given to a child cannot be deemed an advancement, or part thereof; neither is maintenance money, or an allowance made by a freeman to his ſon at the univerſity, or in travelling, &c. to be taken as any part of his advancement; this being only his education, and it would create charge and uncertainty to enquire minutely into ſuch matters. So putting out a child apprentice is no part of his advancement, for it is only procuring the maſter to keep him for ſeven years inſtead of the parent[u].

IT is queſtioned by Mr. Vernon, whether only the proviſion made on the marriage of a child, or in purſuance of a marriage agreement is an advancement[w]; and where 400l. were given to a daughter long after her marriage, and with-

q 2 Cha. Caſ. 160.
r 1 Vern. 216.
s Caſe of Annand and Honeywood, 2 Vern. 345.
t Law of Teſt. 205.
u Laws of Lond. 82.
w 1 Vern. 89.

out

out any agreement that the ſame ſhould be for her marriage-portion; the lord chancellor was of opinion, that it could not be any advancement, unleſs it had been given her as a marriage portion, or in purſuance of a marriage agreement [x]. —— Upon a reference to the recorder of London by the lord chancellor, to certify what is the cuſtom of London concerning the advancement of children by their father; it was certified, that by the laws and cuſtoms of the city, if any freeman's child be married in the lifetime of his or her father, by his conſent, and not fully advanced to his full part or portion of his father's perſonal or cuſtomary eſtate, as he ſhall be worth at the time of his deceaſe; ſuch freeman's child, ſo married, ſhall be excluded and debarred from having any further part or portion of his or her father's perſonal or cuſtomary eſtate, to be had at the time of his deceaſe; except ſuch father, by ſome writing by him written and ſigned with his name or mark, ſhall declare and expreſs the value of ſuch advancement: and then every ſuch child, after the deceaſe of his father, producing ſuch writing, and bringing ſuch portion ſo had of his father into hotchpot, ſhall have as much as will make up the ſame a full child's part or portion of the cuſtomary eſtate which his father had at the time of his deceaſe; notwithſtanding ſuch father ſhall, by any writing under his hand and ſeal, declare ſuch child was by him fully advanced [y]. —— It is ſaid to be ſufficient, if the freeman declare the advancement by any writing under his hand, or by any thing written by him, although it be in an almanack, or elſewhere [z]. But in the caſe of *Dean* and lord *Delaware*, the father's declaring, that the child was fully advanced or not advanced, was of no avail, unleſs it appeared what the advancement was in certainty; to the intent that it might be known, whether ſuch advancement did amount unto as much as would have belonged to the child by the cuſtom [a]. And in a caſe where a freeman had advanced his child on marriage, and the certainty of that advancement did not appear under the freeman's hand; it was adjudged a full advancement, and that the freeman's declaration alone that he had advanced his child, was not of itſelf ſufficient [b].

x 1 Vern. 61.
y L. Raym. 484. Eq Caſ. Abr. 155.
z Green's Privil. Lond. 53.
a H. 1708. 2 Vern. 630.
b Caſe of Cleaver and Spurling, T. 1729. 2 P. Will. 527.

THE

THE child of a freeman of London, when of age, may in conſideration of a preſent fortune, bar herſelf of her cuſtomary part; as where the father, on his daughter's marriage, agreed to give her 3000l; which ſhe being of age, covenanted to receive in full of her cuſtomary ſhare as a freeman's daughter: and though it was objected, that ſuch a future right cannot be releaſed, and that parents might make an ill uſe of the power they have over their children in forcing them to give ſuch diſcharges; yet this was held a good bar of the cuſtom, there being no fraud in the tranſaction [c]. But ſuch releaſe, without a valuable conſideration, is not good; for in ſuch caſe, at the time of the releaſe, the children having neither *jus in re* nor *jus ad rem*, that is, neither right in the thing nor right to the thing, the whole being in the father during his life, there is nothing for any releaſe to operate upon [d].——If a man who is of age, marries a freeman's daughter who is under age, he may bar himſelf of any future right that he might have to the freeman's cuſtomary eſtate by virtue of ſuch marriage; as where a freeman of London had two daughters and one ſon; one of the daughters married, and on receiving a ſuitable portion, the huſband releaſed all right and intereſt which he had or might have to any part of the father's perſonal eſtate by the cuſtom or otherwiſe; and covenanted, that at any time after the death of the father, he would do any further act for the releaſing of any right which he might have by the cuſtom. Jekyll and Gilbert, commiſſioners, inclined to think, that the releaſe being for a valuable conſideration, purporting an agreement to quit the right to the orphanage part, to be binding in equity; but though this might not be ſo clear, yet the covenant for a valuable conſideration to releaſe the future right is good; and ſo they decreed on the execution of the releaſe [e]. Where the huſband and wife, in conſideration of 2000l. the wife's marriage portion, covenanted to releaſe all the right and intereſt that might accrue to them out of the father's perſonal eſtate by the cuſtom of the city of London, and a bill was brought to have a ſpecific performance of the articles made on the marriage. The defence made for the defendant was, that the cuſtomary part being a mere poſſibility and contingency, which might or might not happen, it could

[c] 2 Eq. Caſ. Abr. 272. Str. 947. [e] 2 P. Will. 272.
[d] 1 Atk. 402.

not

not be releaſed; and if it could, that at the time of the articles the wife was an infant, and ſo not bound by them; beſides, that the 2000l. was no conſideration for releaſing ſuch an intereſt, the wife's father having died worth upwards of 20,000l. By lord chancellor Hardwicke. Theſe conſiderations are too looſe either for a judge at law, or in this court, to lay any weight upon; and I muſt determine according to the facts, by the rules of law, and of this court. In this caſe there appears to have been a valuable conſideration for the agreement in the articles, becauſe at the time when the 2000l. were given, the defendant's wife was intitled to no part of the eſtate of her father; and it was given for her advancement in the world; and it is highly reaſonable that ſuch kind of articles ſhould be carried into execution, and that when a father is bountiful to his children in his lifetime, he ſhould have his affairs ſettled to his own ſatisfaction. As to the objection of the cuſtomary part being a poſſibility, and merely in contingency, it is of no weight; for there is no doubt but it might be releaſed in equity: but here is a covenant, which the defendant is bound by in all events. And it is no objection to ſay, that the wife was under age; for though in this reſpect, if the huſband were dead, the articles would not bind her, and ſhe would by ſurvivorſhip be intitled to the cuſtomary ſhare, as a choſe in action not recovered or received by the huſband; yet he being alive, it is a matter that accrues to him in right of his wife; and he may releaſe it, and his releaſe will bind her; and therefore it was reaſonable he ſhould perform his covenant. I found my opinion too on an old law well known in the city, by the name of Jud's law; whereby a huſband was authorized to agree with the father for the wife, though ſhe was under age [f].

As to children partly advanced, bringing their advancement into hotchpot; it may be obſerved, as has been mentioned, that it is to be brought in among the brothers and ſiſters only, but not with the widow [g]: for it has been determined to be beyond all doubt, that where a child that had a portion, but was not fully advanced, but was to bring her portion into hotchpot, that the portion ſhould not be

[f] Caſe of Medcalfe and Ives, 1 Atk. 63. [g] Pag. 106.

brought

brought into the perſonal eſtate in general, ſo that the widow might come in for part of it, but that it ſhould be brought into the orphanage part only [h]. And where a freeman of London hath but one child, and he hath received ſome portion from his father, and the father dies leaving this child and a wife; the child ſhall have his full orphanage part, without any regard to what he hath already received [i]. And where an only child is in part advanced by the father in his lifetime, ſuch child ſhall not bring his portion into hotchpot, there being none in equal degree with him [k]. The only meaning of bringing the child's ſhare into hotchpot is, to make an equality among the children, and not for the benefit of the mother [l].

IF a freeman having ſeveral children, or but one child, doth *fully advance* all his children, or his ſingle child; this ſatisfies the cuſtom, and is the ſame as if he had no child, and his perſonal eſtate ſhall go as if there was none [m], and the wife ſhall have a moiety [n], or one half; which muſt be underſtood to be a moiety or one half by the cuſtom, from which the children, or one child, being fully advanced are excluded. So conſequently, it ſeems, that the other moiety or one half, muſt fall under the direction of the ſtatute of diſtributions, and be diſtributed as the ſtatute directs.

THE cuſtom, it may be obſerved, extends only to the wife and children; whereas, if there is neither wife nor child living at the inteſtate's death, the whole of his perſonal eſtate is ſubject to the ſtatute of diſtribution, as has been mentioned [o], and conſequently muſt be diſtributed in the ſame manner as was ſhewn in a former chapter [p].

BESIDES what has been mentioned, concerning how diſtribution is to be made where the freeman leaves a wife, child, or children; and as we have now ſeen that the wife may be barred by ſettlement, and the children by being advanced; we may here obſerve, that the courſe of diſtri-

h 1 Vern. 345.
i 2 Salk. 426.
k 2 Vern. 234.
l 2 P. Will. 526.
m *Ibid.* 527.
n 2 Vern. 665.
o Pag. 104.
p Chap. 3.

bution

bution of the perſonal eſtate of a freeman of London ſeems to be thus:

IF the freeman dies inteſtate, leaving no wife, but an only child; which child is advanced, or partly advanced, or not advanced; in all theſe caſes it makes no difference, for one way or other ſuch child ſhall have the whole clear perſonal eſtate. For ſuppoſing ſuch child is advanced, he ſhall have nothing by the cuſtom, but by the ſtatute he ſhall have the whole as next of kindred. If he is partly advanced, he ſhall have one half by the cuſtom; there being no other child with whom to bring his partial advancement into hotchpot, and the other half by the ſtatute. So in like manner, if he is not at all advanced; he ſhall have one half by the cuſtom, and the other half by the ſtatute.

IF the freeman leaves no wife but divers children; as ſuppoſe them to be three, the firſt of which is advanced, the ſecond partly advanced, and the third not advanced: in this caſe the child partly advanced, and the child not advanced, ſhall have one half equally betwixt them by the cuſtom; the child partly advanced firſt thereunto bringing his partial advancement into hotchpot; and the other half (which is called the dead man's part) ſhall be diſtributed by the ſtatute equally between thoſe two children, the firſt child being ſuppoſed to be fully advanced already.

As to the repreſentatives of children dead; thoſe we muſt obſerve, are admitted by the ſtatute to a diſtributive ſhare of the dead man's part, in the place of the deceaſed child or children whom they repreſent; but not ſo of the cuſtomary part by the cuſtom.

IF the freeman leaves a wife, and no child; ſhe ſhall have, beſides her chamber, one half by the cuſtom, and the other half (being the dead man's part) ſhall be diſtributed by the ſtatute; of which dead man's part by the ſaid ſtatute ſhe ſhall have one half: ſo that dividing the whole perſonal eſtate into four parts, ſhe ſhall have three, and the next of kindred one. But although there

there be no child of the freeman's living at his death; yet if there hath been a child, and there are any legal repreſentatives of ſuch child, that is, lineal deſcendants; then of the dead man's part by the ſtatute, the wife ſhall have but one-third, and the repreſentatives ſhall have the other two-thirds: ſo that dividing the whole perſonal eſtate into ſix parts, ſhe ſhall have four, and the repreſentatives two.

IF the freeman leaves a wife, and alſo a child or children, any one or more of which children are not advanced; by the cuſtom ſhe ſhall have one-third part, and the children not advanced ſhall have another third part, and the remaining third part (being the dead man's part) ſhall be diſtributed by the ſtatute; of which dead man's part by the ſaid ſtatute ſhe ſhall have one-third, and the other two-thirds ſhall be diſtributed amongſt the children: ſo that dividing the whole into nine, ſhe ſhall have four, and they ſhall have five. But if the wife be barred by ſettlement, whereby it may be as if there were no wife; then the children will have one half by the cuſtom, and the other half by the ſtatute as hath been mentioned [q].

THE orphanage ſhare not being fully veſted in the children till they attain the age of twenty-one, a child entitled to an orphanage ſhare of his father's perſonal eſtate dying under twenty-one, cannot deviſe it by his will; for by the cuſtom it ſurvives to the other children, as hath been mentioned [r]. But a child may deviſe the ſhare which he hath by the ſtatute of diſtributions [s]; and that at the age of fourteen, if a male, and twelve, if a female; provided he or ſhe be of ſufficient diſcretion; as it ſeems expreſsly laid down by Sir William Blackſtone [t]; and his reaſon given for it is, becauſe that is the rule of the civil law, and that as the eccleſiaſtical court is the judge of every teſtator's capacity, this caſe muſt be governed by the rules of the eccleſiaſtical law: ſo that as the learned author ſays, no objection can be admitted to the will of an infant of fourteen merely for want of age; but if the teſtator was not of ſufficient diſcretion, whether at the age of fourteen or four-and-twenty, that will overthrow his teſtament.

[q] Pag. 106.
[r] Pag. 103.
[s] 2 Vern. 459.
[t] Com. 2 V. 497.

SECTION THE THIRD.

THE CUSTOM OF THE PROVINCE OF YORK AS TO INTESTACY.

WE have already ſeen, that here, as well as in the city of London, a man may by will diſpoſe of the whole of his perſonal eſtate to whom he thinks fit, and that the claims of the widows children and other relations to the contrary are totally barred [u]. But as to inteſtacy; if a man being an inhabitant or an houſeholder within the province of York, and dying there or elſewhere inteſtate, and at the time of his death hath a wife, and alſo a child or children; his goods (after paying his debts, and deducting the widow's apparel and furniture of her bed-chamber [w]), ſhall be divided into three parts; whereof the wife ought to have one part, the child or children another part, and the third part (which is called the death's or dead man's part) is diſtributable by the ſtatute; of which dead man's part, by the ſtatute, the wife ſhall have one-third, and the other two-thirds ſhall be diſtributed amongſt the children: ſo that dividing the whole into nine parts, the wife ſhall have four and the children five; in like manner as has been mentioned concerning the cuſtom of the city of London [x]. But if by ſettlement a jointure is limited to the wife, in bar of all her demands out of the perſonal eſtate of her huſband by virtue of the cuſtom, in ſuch caſe it is as if there were no wife with reſpect to the cuſtomary part; ſo, if it is in bar of all her demands, by virtue of the ſaid cuſtom, *or otherwiſe*, ſhe ſhall be debarred alſo of any diſtributive ſhare by the ſtatute [y]. And as to the children; if the inteſtate hath a wife, and a child or children, which child is heir to the inteſtate, or which children were advanced by the father in his lifetime; in this caſe it is as if he had no child: and therefore his goods ſhall be divided into two parts;

[u] Pag. 101.

[w] By the general and ancient cuſtom of the province of York, widows have been tolerated to reſerve to their own uſe, not only their apparel and a convenient bed, but a coffer with divers things therein neceſſary for their own perſons; which things have been uſually omitted out of the inventory of their deceaſed huſbands goods, unleſs the huſband was ſo far indebted, as the reſt of his goods would not ſuffice to diſcharge the ſame. Swinb. 422.

[x] Pag. 104.

[y] 1 Ver n. 15.

whereof

whereof the wife is to have one part to herſelf, and the other half is diſtributable by the ſtatute[z], as we ſhall ſee more of hereafter. —— If the inteſtate hath neither wife nor child at the time of his death, his whole perſonal eſtate (the funeral expences, and other neceſſary charges being firſt deducted) ſhall be diſpoſed of in due courſe of adminiſtration, as now falling under the direction of the ſtatute of diſtribution[a]; and conſequently muſt be diſtributed in ſuch manner as was ſhewn in a former chapter[b].

As to the child's being excluded as being heir; this, we may obſerve, is one of the main points wherein the cuſtom of the city of London and province of York differ; as in the former, whatever real eſtate the child has, either by deſcent from his father, or conveyed to him by his father in his life-time, it will in no wiſe bar the child from receiving his ſhare of his father's perſonal eſtate; whereas here he will be totally barred from receiving any part thereof *by the cuſtom*, if he ſhould have any real eſtate by deſcent, or otherwiſe, from his father. For here not only the heir of lands holden in fee-ſimple is thereby barred from the recovery of a filial portion, but he alſo that is heir in fee-tail, either general or ſpecial[c]: and although the lands be of very ſmall revenue, perhaps not more than a noble yearly rent, and the goods very great in compariſon of ſo ſmall a rent (as may be 1000l. or more); even in this caſe the heir is barred from the hope of a filial portion[d]: and not only that heir is excluded from a filial portion who doth enter upon the land immediately after his father's death, but he alſo who is heir in reverſion, is heir; and being heir, can have no filial portion: ſo by this it may fall out very hard with the heir in reverſion; for if he ſhould

z Swinb. 220.

a *Ibid.*

b Chap. 3.

c Eſtates tail may be either general; —or general to male or to female;—or ſpecial;—or ſpecial to male or to female. Tail general is, where lands and tenements are given to one, and the heirs of his body begotten. By which manner of bequeathing, how often ſoever the donee in tail marries, his iſſue by every ſuch marriage is in ſucceſſive order capable of inheriting the eſtate tail *per formam doni*, that is, by the form of the gift. If lands are given to a man, and the heirs male of his body begotten, it creates an eſtate in tail male general: and *vice verſa*, an eſtate tail female general. Tenant in tail ſpecial is, where the gift is reſtrained to certain heirs of the donee's body, and does not go to all of them in general. As where lands and tenements are given to a man and the heirs of his body, on Mary his wife to be begotten; hereby no iſſue can inherit, but ſuch ſpecial iſſue as is engendered between them two; not ſuch as the huſband may have by another wife; and therefore it is called ſpecial tail. Black. b. 2. c. 7.

d Swinb. 231, 232.

die in the mean time, before he could lawfully enter to thoſe lands which be his only in reverſion, he could reap no benefit either of his father's lands or goods; yet he muſt be content with his lot, and though not he, but his ſhall enjoy the land at the time appointed [e]. And although the heir receive the land by ſettlement made upon his father's marriage; yet he is heir ſo as to be excluded thereby from a filial portion; as where the father having by ſettlement on his marriage ſettled his real eſtate to himſelf for life, part to his wife for her jointure, and the remainder of the whole to his firſt and other ſons in tail, remainder to his own right heirs; the eldeſt ſon was thereby excluded *by the cuſtom of the province of York* from having any ſhare of his father's perſonal eſtate [f]. And if the heir hold lands by deed of feoffment [g] in mortgage, or with clauſe of redemption; that is to ſay, upon condition that if the feoffor pay unto him a ſum of money at a certain day, that then the feoffor may re-enter, and the deed or grant be void; yet in the mean time, until the condition be performed, and the land redeemed, if he ſhould demand any filial portion he is barred; becauſe as yet he is heir to the deceaſed. But if the lands ſhould be redeemed, and the money ſatisfied, then it is thought that he may recover a filial portion; becauſe then he is not heir to the deceaſed, nor the advancement certain which was made by the father in his lifetime [h].

HAVING thus ſeen how the heir may be barred from receiving a filial portion by having lands from his father by deſcent or otherwiſe; we come now to conſider what advancement will bar a child from receiving a filial portion. But before we proceed with this, we may here juſt take notice, that what has been ſaid concerning the heir being barred, relates ſolely to his being barred of what he would be intitled to by the cuſtom, and not what he will be intitled to by the ſtatute; which we ſhall perceive by what will be ſaid hereafter.

[e] Swinb. 231.

[f] Caſe of Conſtable and Conſtable, 2 Vern. 375.

[g] A feoffment, or deed of feoffment, is the ancient method of conveyance. Black. Com. 2 V. 310. Yet ſince the ſtatute of 27 Hen. VIII. c. 10 of uſes, the conveyance by leaſe and releaſe has taken place of it, and is become a very common aſſurance to paſs lands and tenements; for it amounts to a feoffment, the uſe drawing after it the poſſeſſion without actual entry, and ſupplying the place of livery and ſeiſin required by the deed of feoffment. 2 Ven. 35.

[h] Swinb. 232.

As concerning the advancement, whereby a child may be barred from receiving a filial portion; this advancement muſt be by the father in his lifetime. For although another beſtow any advancement, be it as much as it may, this preferment by another is no bar to the child from the recovery of a filial portion of his father's goods; much leſs where the child hath advanced his eſtate by his own induſtry[l]. And if the father beſtow any thing upon another for his child's ſake, or for the good of his child; this is no ſuch preferment as will hinder a child of his filial portion[k]: and therefore if the father beſtow any thing upon a man of trade, to take his ſon for an apprentice, and to teach him his myſtery, this is no advancement to the effect aforeſaid[l]; or if the father beſtow any thing upon a ſchoolmaſter, or tutor in the univerſity, for the increaſe of his child's knowledge in learning, or for any degree there to be obtained; this is no advancement to exclude the child of a filial portion[m].

THE advancement muſt be a proviſion made by the father of ſome competent thing for the maintenance of his child, whereby he may be the better enabled to live after his father's death; for if the father beſtow any thing upon his child to any other end, as money in his purſe to ſpend among his equals, or to buy him ſuits of apparel or books; yet this is not to be holden for an advancement[n].——If a portion be given to a child in lieu and ſatisfaction of a filial portion, and the child be of age, and in conſideration thereof doth releaſe his future filial portion; then the child will be barred of any future claim: as a child when of age, for a valuable conſideration may releaſe his future filial portion[o].——If the father in his lifetime beſtow a leaſe upon his child, or grant unto him an annuity for life out of his lands, though it be in ſuch manner as the child ſhall not reap any benefit thereby, ſo long as the father lives, but after his death; this is holden for a preferment or advancement; becauſe it was aſſured unto him in his father's lifetime[p]. And if the father beſtow a competent portion with his daughter in marriage upon him that ſhall marry her; this is ſuch an advancement as will bar her from a demand of a filial portion[q]. By the word portion is to be underſtood, not only a ſum of money, or part of the father's goods and chattels; but alſo lands and annuities beſtowed by the father upon the ſon[r].——Competent, ſigni-

[i] Swinb. 233.
[k] *Ibid.*
[l] *Ibid.*
[m] *Ibid.*
[n] *Ibid*, 234.
[o] 4 Burn's Eccleſ. Law, 395.
[p] Swinb. 234.
[q] *Ibid.*
[r] *Ibid.*

fies equal, or not far inferior to that quantity which otherwiſe, according to the cuſtom of the province, ſhould fall to be due to the child, after the rate and proportion of the father's eſtate, at the time when he doth beſtow any ſuch thing upon his child; for the ſame being equal, or not much under the rate which ſhould belong to the child by the cuſtom, if his father had then died, ſhall ſtand for a ſufficient preferment and advancement to exclude him from a filial portion [s].

IT ſeems ſince Swinburn's days generally to have prevailed as the cuſtom of the province of York, that children (excluſive of the heir at law) not advanced to their full proportion of the children's part, ſhall be admitted to come in for their ſhare of the ſaid children's part, bringing thereunto their partial advancements into hotchpot: agreeable to what Swinburn acknowledgeth to be the rule of the civil law; in conformity alſo to the cuſtom of London, and to the meaſures of the ſtatute of diſtribution, and the rules obſerved by the courts of equity in all ſuch like caſes [t].

WHERE there is a wife, child, or children, the courſe of diſtribution of inteſtates effects within the province of York ſeems to ſtand thus:

IF a perſon die inteſtate, leaving no wife, but an only child, which child is heir at law, or advanced, or partly advanced, or not advanced; in all theſe caſes it makes no difference; for one way or other ſuch child ſhall have the whole clear perſonal eſtate. For ſuppoſing ſuch child to be heir at law; he ſhall have nothing by the cuſtom, but by the ſtatute he ſhall have the whole as next of kindred. If he is advanced; he ſhall likewiſe have nothing by the cuſtom, but by the ſtatute in like manner he ſhall have the whole. If he is partly advanced; he ſhall have one half by the cuſtom, there being no other child with whom to bring his partial advancement into hotchpot; and the other half by the ſtatute. So in like manner, if he is not at all advanced; he ſhall have one half by the cuſtom, and the other half by the ſtatute.

[s] Swinb. 234. [t] 4 Burn's Eccleſ. Law, 403.

IF

IF ſuch perſon hath divers children; one of whom is heir at law, and the others are advanced; in this caſe, with reſpect to the cuſtom, it is as if he had no children: none of them can claim any thing by the cuſtom; and (the younger children being ſuppoſed to be fully advanced) the heir at law by the ſtatute ſhall have the whole. So here we may obſerve, as before hinted [u]; that as to the cuſtom the heir at law is barred by having lands; yet by the ſtatute he is in nowiſe barred by any lands that he may have had by deſcent or otherwiſe from the inteſtate; which we have ſeen in a former chapter [w].

IF ſuch perſon hath divers children, the firſt of which is heir at law, the ſecond advanced, the third partly advanced, and the fourth not advanced; in this caſe, the child partly advanced, and the child not advanced, ſhall have one half equally betwixt them by the cuſtom, the child partly advanced firſt thereunto bringing his partial advancement into hotchpot; and the other half (which is the dead man's part) ſhall be diſtributed by the ſtatute equally amongſt all the ſaid children (the ſecond only excepted, who is ſuppoſed to be fully advanced already), ſhare and ſhare alike. But if the heir at law hath been advanced by his father, otherwiſe than by lands, or as heir at law; he ſhall bring ſuch advancement into hotchpot with his brothers and ſiſters, otherwiſe he ſhall have no diſtributive ſhare by the ſtatute.

IN reſpect of the dead man's part, which is diſtributable by the ſtatute; we muſt obſerve as to this, that the repreſentatives of children dead are admitted to a diſtributive ſhare in the place of the deceaſed child or children whom they repreſent; but not ſo of the cuſtomary part by the cuſtom.

IF a man hath a wife and no child, ſhe ſhall have (beſides her convenient bed and apparel) one half by the cuſtom, and the other half (being the dead man's part) ſhall be diſtributed by the ſtatute; of which dead man's part by the ſaid ſtatute ſhe ſhall have one half, and the other half ſhall go to the next of kindred to the deceaſed in equal degree: ſo that dividing the whole into four parts, ſhe ſhall have

[u] Pag. 116. [w] Chap. 3. pag. 67.

three, and they ſhall have one. But in reſpect to the dead man's part, although there be no child, yet if there hath been a child, and there are any legal repreſentatives, that is, lineal deſcendants of ſuch child; then of the dead man's part by the ſaid ſtatute, the wife ſhall have but one-third, and the repreſentatives ſhall have the other two-thirds: ſo that dividing the whole into ſix parts, ſhe ſhall have four and they ſhall have two.

IF a man hath a wife, and alſo a child or children, one of which children is heir at law, and the others are advanced; in this caſe, with reſpect to the cuſtom, it is the ſame as if he had no child; and conſequently the wife ſhall have one half by the cuſtom, and the other half (being the dead man's part) ſhall be diſtributed by the ſtatute; of which dead man's part, by the ſaid ſtatute, ſhe ſhall have one-third, and the other two-thirds ſhall go to the heir at law: ſo that dividing the whole into ſix parts, ſhe ſhall have four, and he ſhall have two.

If a man hath a wife, and alſo a child or children, any one or more of which children are not advanced; by the cuſtom ſhe ſhall have one-third part, and the children not advanced ſhall have another third part, and the remaining third part (being the dead man's part) ſhall be diſtributed by the ſtatute: of which dead man's part, by the ſaid ſtatute, ſhe ſhall have one-third, and the other two-thirds ſhall be diſtributed amongſt the children; ſo that dividing the whole into nine, ſhe ſhall have four, and they ſhall have five.

To illuſtrate this, let us here for example ſuppoſe a man inhabiting within the province of York dies inteſtate, leaving a clear perſonalty of 9000l; and leaving a widow and four children; the firſt being heir at law to freehold lands, and having received likewiſe of his father in his lifetime 400l to ſet him up in trade; the ſecond advanced to the amount of 3000l; the third partly advanced, to the amount of 600l; and the fourth not at all advanced. The queſtion is, How this perſonalty ſhall be diſtributed? Firſt of all, the widow ſhall have one-third part by the cuſtom, as her widow's portion, to wit, 3000l. Another third part, by the ſaid cuſtom, ſhall be diſtributed amongſt the children; of which the heir

at

at law (as ſuch) by the ſaid cuſtom is excluded from recovering any ſhare; the ſecond ſon alſo, as being fully advanced, is excluded; but hereunto the third ſon ſhall bring his partial advancement of 600l into hotchpot, and then the third and fourth ſons ſhall divide the 3600l equally between them; but the real benefit thereof to the third ſon will be but 1200l and to the fourth ſon 1800l. The remaining third part of the ſaid perſonalty, which is the dead man's part, ſhall be diſtributed by the ſtatute; of which, by the ſaid ſtatute, the widow ſhall have one-third, to wit, 1000l; and the reſidue, being 2000l, ſhall be diſtributed equally amongſt the ſaid three children, viz. the heir at law, and third and fourth ſons (the heir at law being let in for ſo much by the ſtatute; and the ſecond ſon being ſtill excluded, as having received more than his juſt proportion of his father's whole perſonal eſtate); but hereunto the heir at law ſhall firſt bring his partial advancement of 400l into hotchpot, and ſo the ſaid three children ſhall divide the whole 2400l equally amongſt them; but the real benefit thereof to the heir at law will be but 400l, and to the ſaid two younger children 800l each. So that of the whole clear perſonalty of 9000l, the widow ſhall have 4000l, the heir at law 400l, the ſecond child nothing, the third child 2000l, the fourth child 2600l; which added together makes the 9000l [x]. But if by ſettlement a jointure is limited to the wife, in bar of all her demands out of the perſonal eſtate of her huſband, by virtue of the cuſtom or otherwiſe, ſhe will be debarred of any ſhare, either by the cuſtom or ſtatute; and in ſuch caſe it will be as if there were no wife, as has been mentioned [y]; and conſequently the children muſt have the whole.

BY this cuſtom, the cuſtomary ſhare which the children are intitled to, veſts in them immediately on the inteſtate's death; quite different to the cuſtomary ſhare which the children of a freeman of London are intitled to by the cuſtom of London, which does not veſt in them till they are twenty-one years of age; wherefore, until they attain that age, they cannot diſpoſe of it by will; and if they die under that age their ſhare ſurvives to the other children, as has been ſhown [z]. But here, as the cuſtomary ſhare veſts immediately on the in-

[x] 4 Burn's Eccleſ. Law, 407.
[y] Pag. 114.
[z] Pag 103.

teſtate's

teſtate's death, as doth the ſhare the children are intitled to by the ſtatute of diſtribution; ſo that the whole is veſted in them immediately on the inteſtate's death, and being ſo veſted, in caſe either child dies under age, and without will, the ſhare of ſuch child will fall under the ſtatute of diſtribution, and go according to the courſe of diſtribution treated of in a former chapter [a]. And if the infant be of the age of fourteen, if a male, or twelve, if a female, he or ſhe may diſpoſe thereof by will; as has been before mentioned concerning what an infant is intitled to by the ſtatute of diſtribution [b].——That a male infant may make a will, and thereby diſpoſe of his goods and chattels at the age of fourteen, and a female at the age of twelve years, ſeems generally ſo to be allowed as not to admit of a doubt; provided they be of ſufficient diſcretion. But as to real eſtates, by the ſtatute 34 & 35 Hen. VIII. c. 5. ſect. 14. wills or teſtaments made of any manors, lands, tenements, or other hereditaments, by any perſon within the age of twenty-one years, ſhall not be good or effectual in law.

SECTION THE FOURTH.

OBSERVATIONS ON THE USE AND BENEFIT A WILL MAY BE OF TO A MAN'S FAMILY OR RELATIONS.

HAVING now ſhewn that not only every man is at liberty to make a will, and thereby to diſpoſe of the whole of his perſonal eſtate to whom he thinks fit [c], but alſo that infants at the age of fourteen years, if males, and twelve if females, may make wills, and thereby diſpoſe of their perſonal eſtate: here we may make a few brief obſervations on the utility of a will, and the benefit the ſame may be of to a man's family or relations; provided it be made with good advice. And to this end let us firſt ſuppoſe a man to have relations, ſeveral of whom may be intitled to the adminiſtration of his eſtate; and he makes his will, and

[a] Chap. 3.
[b] Pag. 113.
[c] Pag. 101.

appoints

appoints one or more executors, and thereby gives his relations his perſonal eſtate, juſt in the ſame proportion as the law would intitle them thereto in caſe he had died inteſtate, and left it to the diſpoſition of the law: now by means of the will, for which ſome at firſt ſight may be apt to think there was little occaſion, much altercation may be prevented; as thereby all diſputes and controverſies concerning who ſhould have the adminiſtration will be totally excluded, no room being left for diſpute; and therefore, it is probable very conſiderable expence will be ſaved; for as we have ſeen in the firſt chapter of this book, there may be room for contending who ſhould, and who ſhould not have the adminiſtration; and in the ſecond chapter, we may perceive there are many circumſtances that might excite thoſe intitled thereto, rigorouſly to contend for it; which having too often been the caſe, and the determining who ſhould have the adminiſtration attended with ſuch expence and detriment to the parties concerned, as ultimately to render the inteſtate's perſonal eſtate of little or no benefit to them.

NEXT let us ſuppoſe a man to die inteſtate, leaving a wife and ſeveral children who are of age, and equally intitled to the adminiſtration with their mother; yet all amicably agree to ſuffer their mother alone to adminiſter their deceaſed father's eſtate; and that one or more of thoſe children have been advanced by their father, either in part or to the full amount of their ſhare of his perſonal eſtate. Now although thoſe children may all have amicably agreed to ſuffer their mother to adminiſter, yet it may not only require ſome conſideration for the adminiſtratrix to aſcertain this advancement, and ſo to make a juſt and equal diſtribution amongſt them, purſuant to the ſtatute of diſtribution; and (if the inteſtate be a citizen of London, or an inhabitant of the province of York, where the cuſtoms interfere with the ſtatute) to make diſtribution purſuant to thoſe cuſtoms and the ſtatute; but it will probably require much more conſideration, as well as a deal of pains and trouble for the adminiſtratrix, after ſhe has

has allotted each of thoſe children their lawful ſhare, to convince them that it is the whole each can demand; ſo that all may be ſatisfied of juſtice being done, and thereby be prevented from calling in the aid of counſel, or ſome perſon learned in the law; if not the aid of a court of equity, to ſatisfy them reſpecting their ſhares of their deceaſed father's eſtate: which latter aid having been often required when the former could not ſatisfy, the conſequence hath been, that conſiderable ſums of money have been ſpent in litigation, and that not only to the great loſs, but even to the utter ruin of ſome of the inteſtate's children; which might totally have been prevented, had he made a will with good advice, as by the aſſiſtance of ſome perſon ſufficiently verſed in the law.

AGAIN, let us ſuppoſe a man to die inteſtate, leaving no wife, but a child or children, who may not be of the age the law requires to adminiſter his eſtate. Here, as concerning the perſonal eſtate, the ordinary aſſigns ſome perſon to take care thereof, and to provide for the infant's maintenance and education[d]. Whereas the father might by will have veſted his eſtate in one or more of his judicious friends to have taken care thereof, and to have diſpoſed of it at ſuch times, and in ſuch manner as he might have directed; by which means he would not only have had one or more perſons of his own chooſing to take care of his eſtate for his children, and to diſtribute it to them according to his own direction, but would have ſaved the expence which the ordinary's aſſignment is attended with, and which ceaſes when either child attains twenty-one years of age, on which a new adminiſtration is granted; the expence whereof, as well as of that which ceaſes, is ſomewhat more than the expence of general letters of adminiſtration: ſo that in this caſe here is perhaps more than double the expence to come out of the deceaſed's eſtate than the proving his will (if he had made a will) would have been attended with; and probably much

[d] Black. Com. 1 V. 461. 463. See page 5.

greater expence than this the children when of proper age, may be occaſioned, by calling the perſon aſſigned by the ordinary to account, and in getting his account ſettled and adjuſted.

CONCERNING the utility of a will, and the benefit it may be of to a man's family or relations, much more might be ſaid; as any perſon after reading this work may clearly perceive, and thereby ſee that ſuch advantage may redound to a man's family or relations by a will, as to be convinced that the ſmall expence of employing counſel, or a perſon ſufficiently verſed in the law for making it, is not an object to be compared with the hazard of litigation that might be occaſioned by a perſon's dying inteſtate; and the loſs and detriment his family or relations may thereby ſuſtain.——By a will made with good advice, or by the aſſiſtance of a perſon ſufficiently verſed in the law, the teſtator's eſtate may be given and diſpoſed of ſo as not to leave the leaſt room for diſpute or litigation; yet if the will be not made with good advice, it may be attended with as bad conſequences as if the teſtator had died inteſtate, and left his eſtate to the diſpoſition of the law; and this is obvious to every perſon who has been converſant with the books of report, or hath attended the courts of juſtice; and it is obſerved by Sir William Blackſtone [c], that an ignorance of the forms which the policy of the laws hath made neceſſary for the wording of laſt wills and teſtaments, and of the atteſtation, muſt be of dangerous conſequence to ſuch as compile their own teſtaments without any aſſiſtance; and that thoſe who have attended the courts of juſtice, are the beſt witneſſes of the confuſion and diſtreſſes that are thereby occaſioned in families, and of the difficulties that ariſe in diſcerning the true meaning of the teſtator, or ſometimes in diſcovering any meaning at all; ſo that in the end his eſtate may be veſted quite contrary to his intentions; becauſe he has perhaps omitted one or two formal words, which are neceſſary to aſcertain the ſenſe with indiſ-

[c] Com. 1 V. 7.

putable

putable legal preciſion, or has executed his will in the preſence of fewer witneſſes than the law requires.

A FURTHER illuſtration hereof will appear in the enſuing part of this work, where the teſtator has ſuch inſtructions for making his will, as by due attention thereto, he may be aſſiſted and enabled to make it with accuracy; unleſs his eſtate ſhould be ſo fettered with intails, or entangled by ſettlements or conveyances, as to render him incapable of forming a juſt conception thereof; and under ſuch circumſtances as well as when the eſtate is of very conſiderable value, it is adviſable for him to apply to counſel, or ſome perſon well verſed in the law, for further information.

HERE we may juſt mention that it hath been preſumed, where a will has been made contrary to the intereſt and inclination of ſome of the teſtator's family or relations, the ſame unknown to him has been deſtroyed before his death, or concealed afterwards; and thereby notwithſtanding the care he may have taken to diſpoſe of his eſtate and effects, the ſame have been left to the diſpoſition of the law: and for preventing ſuch misfortune we may obſerve lord Coke's advice; which is to make two parts of the will, and to leave one part thereof in the hands of a friend [f]; either of which parts may be proved, and here by the teſtator's will may be ſecured; and if he ſhould have a mind to cancel it at any time before his death, this will in no wiſe prevent or hinder him from ſo doing; no more than if there was only one part. For the cancelling of one part is as the cancelling of both [g]. ——Where the eſtate and effects are of any conſiderable value, this method of making the will in two parts, and leaving one part thereof with a friend, is commonly uſed.

[f] 3 Co. Rep. 36. [g] Gilb. 107, 130. 2 Vern. 742.

THE

THE DISPOSAL OF A PERSON's ESTATE BY WILL AND TESTAMENT.

CHAP. I.

The Power a Man hath for diſpoſing of his Property by Will. What he may not diſpoſe of by Will. Eſtates to be ſo diſpoſed of as not to be rendered unalienable after a certain Time.

IN the former part of this work it has been ſhewn, that all perſons may by will diſpoſe of their perſonal eſtate to whom they think fit[a]; and that male infants if they are of ſufficient diſcretion at fourteen, and females at twelve years of age, may diſpoſe of their perſonal eſtate by will[b]. Perſonal eſtate is generally underſtood in contradiſtinction to real eſtate, as money, goods and chattels, particulariſed in the ſecond ſection of the ſecond chapter of the law's diſpoſal, and there ſhewn by what will go to the adminiſtrator[c]. As to real eſtate, by ſtatute 34 and 35 Hen. VIII. c. 5. and by virtue of the ſtatute 12 Car. II. c. 25, all perſons (except married women, infants, idiots, and perſons of nonſane memory) are empowered to diſpoſe by will of the whole of their landed property, or real eſtates (except their copyhold eſtates) to whom they think fit, un-

[a] Page 101.
[b] Page 113. 122.
[c] Page 28—36.

leſs

leſs it be to bodies corporate[d]; and that even to the total diſinheriſon of the heir at law, notwithſtanding that erroneous opinion which ſome entertain of the neceſſity of leaving the heir a ſhilling, or ſome other expreſs legacy, in order to diſinherit him effectually.

THUS has the legiſlature enabled perſons to diſpoſe of their landed property to any perſon or perſons, except it be to bodies corporate, the reaſon of which exception will be ſhewn hereafter[e]. And as to freehold eſtates held by one perſon during the life of another, ſtyled eſtates *pur auter vie*, thoſe are alſo deviſable by will as may be perceived by what has heretofore been mentioned[f]. But no proviſion being yet made with reſpect to copyhold eſtates, the power of deviſing is now indirectly exerciſed over thoſe by an application of the doctrine of uſes, ſimilar to that which was anciently reſorted to in reſpect to freehold lands; for the practice is to ſurrender to the uſe of the owner's laſt will, and on this ſurrender the will operates as a declaration of the uſe and not as a deviſe of the land itſelf[g]. So from hence it may be perceived that the teſtamentary power is now exerciſable either directly or indirectly over land of every tenure now in uſe. But with reſpect to land, it muſt be obſerved, that a deviſe will not operate thereon, unleſs the teſtator is in poſſeſſion thereof at the time of executing his will; yet as to perſonal eſtate it will operate upon whatever a man has thereof at the time of his death, concerning which we ſhall ſee more in a ſubſequent chapter[h].

WHERE there is a general deviſe of lands, and there is no ſurrender of the copyhold lands to the uſe of the will, the conſtruction at law is, that thoſe do not paſs by the will; copyhold lands not being properly the ſubject of a deviſe, and therefore do not paſs by the will but by the ſurrender[i]. So if I would deviſe a copyhold eſtate I muſt ſurrender it to the uſe of my will, otherwiſe after my death application muſt be made to a court of equity for ſupplying the defect thereof, which the court will do in ſome caſes, as in favour of a *child* or *widow*, and in favour of creditors where there is a deviſe of real eſtate to pay debts, and there is no real eſtate but copyhold[k].

[d] Black. Com. 2 V. 375, 376.
[e] Page 136.
[f] Page 49.
[g] Co. Litt. 111. Note 1. 13 Edit.
[h] Page 169, 170.
[i] 1 Atkyns 388.
[k] Law of Teſt. 171. 4 Burn's Eccleſ. Law 59.

CON-

CONCERNING infants, married women, ideots, and perſons of nonſane memory, more will be ſaid hereafter under a ſubſequent head; and here we may obſerve, that notwithſtanding the law has given a man a large and extenſive power for diſpoſing of his property by will, yet there are ſome eſtates and effects which he may by *deed* or otherwiſe diſpoſe of in his life-time, but is not allowed to diſpoſe thereof by will: and thoſe ſhall be our next ſubject.

IN the ſecond ſection of the former part of this work, it is ſhewn that all ſuch chattels perſonal as a woman is poſſeſſed of, immediately on marriage veſt in her huſband; and that her chattels real he may make his own if he pleaſes[l]. The former of thoſe he may diſpoſe of by will to whom he thinks fit; but the latter, unleſs he exerciſed ſome act of ownerſhip to make them his own, as in caſe of leaſehold eſtates for years, or for years determinable upon lives, he may ſurrender the leaſes and take new leaſes, or ſell the eſtates and repurchaſe them, otherwiſe thoſe will not paſs by his will, but on his death will return to his wife; yet if he ſurvives her will be his own to all intents[m]. So it will be in reſpect of any debts that were due to the wife before marriage, and which were not received or got in by the huſband and wife during their joint lives. So likewiſe it will be in reſpect of the wife's paraphernalia deſcribed in the former part of this work[n].

IF any eſtate either real or perſonal is held in joint-tenancy, it cannot be deviſed by will; for a deviſe of an eſtate whereof the deviſor is jointly ſeiſed is void, the will not taking effect till after the death of the deviſor, and by his death all the eſtate preſently comes by the law to his companion which ſurviveth[o], and who takes the whole by prior title[p].——As the nature and effects of joint-tenancy is very neceſſary to be

[l] Page 2.
[m] 4 Co. Rep. 51.
[n] Page 36, 37.
[o] Co. Litt. 185, 186.
[p] Gilb. on Wills, 123.

underſtood, I ſhall here be ſomewhat particular in deſcribing it; and then ſhew how a joint-tenant may obtain power for deviſing his part by will. Joint-tenancy is where two or more perſons come to and hold an eſtate jointly by one title, and thoſe perſons are called joint-tenants, becauſe the eſtate is conveyed to them jointly; as where a man is ſeiſed or poſſeſſed of an eſtate in fee-ſimple, and makes a conveyance to two or more and their heirs, or makes a leaſe to them for life, or where two or more have a joint eſtate in a chattel real or perſonal, or a joint eſtate in a debt, duty, covenant, contract, &c. it is a joint-tenancy, and the part of him that dies goes not to his heir, executor or adminiſtrator, but the whole to the ſurvivors or ſurvivor [q]; and a will made by a joint-tenant during the continuance of the joint-tenancy is not a good will, even as to his ſhare of the eſtate under the ſtatute of wills, notwithſtanding a ſubſequent ſeverance of the joint-tenancy by a partition made *after* the making of the will and *before* the teſtator's death, unleſs there be a republication of it after the partition [r]. But as to joint-merchants for the wares, merchandizes, debts or duties, that they have as joint-merchants or partners, the ſame ſhall not ſurvive but ſhall go to the executors or adminiſtrators of him that dieth, by the law of merchants, which is part of the laws of this realm for the advancement and continuance of commerce and trade, as being for the publick good [s]. And for the encouragement of huſbandry and trade, it is held that a ſtock on a farm, though occupied jointly, and alſo a ſtock uſed in a joint undertaking by way of partnerſhip in trade, ſhall always be conſidered as common and not as joint property, and there ſhall be no ſurvivorſhip therein [t]. So that it may be in the power of the joint-merchant, joint-trader, or farmer, to deviſe his ſhare by will; and in caſe he dies without will the ſame ſhall go to his adminiſtrators, as his

[q] Black. Com. 2 V. 399.
[r] Burr. Manſf. 1488.
[s] Co. Litt. 182.
[t] Black. Com. 2 V. 399.

other

other perſonal eſtate; yet in deeds of partnerſhip it is uſual to inſert a covenant for this purpoſe.

IN order to ſhew how one joint-tenant may obtain power to deviſe his part by will, we may firſt take notice of the difference between joint-tenants and thoſe called tenants in common; and then proceed to ſhew how a joint-tenancy may be turned into a tenancy in common by either of the tenants, and from that brought into a ſeparate eſtate. Joint-tenants have the eſtate by one joint title and in one right, and tenants in common by ſeveral titles, or by one title and by ſeveral rights, but this property is common to them both, viz. that their occupation is undivided, and that neither of them knoweth his own ſeparate part [u], both having a unity of poſſeſſion, ſo that neither tenant is poſſeſſed of any particular part of the eſtate, but each hath a ſhare in and throughout the whole; and, as has been obſerved, an eſtate held in joint-tenancy goes to the ſurvivors or ſurvivor, and never deſcends to the heir nor goes to the executor or adminiſtrator of the deceaſed, except in the caſe of joint-merchants, traders, &c. But an eſtate held by a tenancy in common, either of the tenants may diſpoſe of his part to whom he pleaſes by will, and the deviſee or deviſees to whom the ſame is deviſed will have a good title thereto; and in caſe the eſtate is not deviſed by will, and one of the tenants thereof dies inteſtate, his ſhare will deſcend or go to his iſſue or next of kin [w].

THE creation of an eſtate in joint-tenancy depends on the wording the deed or deviſe by which the tenants claim title;

[u] Co. Litt. 189.

[w] Hawkin's Abr. Co. Litt. 267.

for this eſtate can only ariſe by purchaſe[x] or grant, that is, by the act of the parties, and never by mere act of the law[y]. If an eſtate be given to two or more perſons without adding any reſtrictive, excluſive, or explanatory words, as if an eſtate held in fee-ſimple be deviſed to A and B and their heirs, this makes them joint-tenants in fee thereof; ſo if it be given to A and B for their lives, it makes them joint-tenants for life. So if a chattel real, as a leaſehold eſtate for years, or any chattel perſonal, as a horſe, a piece of plate, or any houſehold goods, be given to two or more perſons without adding any reſtrictive, excluſive, or explanatory words, they are joint-tenants thereof. A tenancy in common may be created by expreſs limitation, but care muſt be taken not to inſert words which imply a joint eſtate; but as in this reſpect there is great nicety in wording of wills as well as deeds, it is the moſt uſual as well as the ſafeſt way, when a tenancy in common is meant to be created, to add expreſs words of excluſion as well as deſcription, and limit the eſtate whether real or perſonal to A and B [*the perſons to whom it is limited*] to hold *as tenants in common, and not as joint-tenants*[z].

JOINT-TENANCIES may at any time be turned into tenancies in common at the election of either of the joint-tenants; for if one joint-tenant alienes or conveys his eſtate to a third perſon, the joint-tenancy is ſevered and turned into a tenancy in common; for the grantee and the remaining joint-tenant hold by different titles (one derived from the original, the other from the ſubſequent grantor); and if a joint-tenant in fee makes a leaſe for life of his ſhare, this defeats the jointure[a]; ſo if there be three joint-tenants and

x The word Purchaſe is defined page 69.

y Black. Com. 2 V. 180.

z *Ibid.* 194.

a *Ibid.* 185, 186.

one

one of them aliene that which to him belongeth to another, in this caſe the alienee is tenant in common with the other two joint-tenants, but the other two are ſeiſed of the two parts which remain jointly, and of theſe two parts ſurvivorſhip will take place [b]; and if one of three joint-tenants releaſes his ſhare to one of his companions, though the joint-tenancy is deſtroyed with regard to that part, yet the two remaining parts are ſtill held in jointure [c]. When a joint-tenancy is turned into a tenancy in common, any of the tenants in common, as has before been obſerved, may deviſe their ſhare by will, or the ſame if not deviſed will deſcend or go to their iſſue or next of kin [d]; yet the deviſees or iſſue will not have an eſtate in ſeveralty or any ſeparate eſtate, but will ſtill be tenants in common, and till partition made, the unity of poſſeſſion will continue; for there are only two ways by which eſtates held as tenancies in common can be diſſolved; the one is by uniting all the titles and intereſt in one tenant by purchaſe or otherwiſe, whereby the whole may be brought to one ſeveralty, or the whole eſtate veſted in one of them; the other is by making partition [e], which if they mutually agree, they may make when they pleaſe between themſelves; but if they cannot mutually agree to divide, they may have recourſe to the writ framed upon the ſtatutes 31 Hen. VIII. c. 1. and 32 Hen. VIII. c. 32. whereby all joint-tenants and tenants in common, either of eſtates of inheritance or other leſs eſtates, are compellable to make partition [f].

HAVING thus ſhewn what a man may, and what he may not diſpoſe of by will, we come now to treat on the diſpoſal of eſtates in ſuch manner as the ſame may not thereby be rendered unalienable after a certain time.

ALTHOUGH, as it has been obſerved, a man may by will diſpoſe of his landed property to whom he thinks fit, and

[b] Co. Litt. 189.
[c] Black. Com. 2 V. 186.
[d] Pag. 131.
[e] Black. Com. 2 V. 194.
[f] *Ibid.* 185.

that even to the total diſinheriſon of the heir at law, yet he muſt diſpoſe of it in ſuch manner as that it may be aliened or conveyed within ſuch time as the law hath fixed; in order that it might thereby be rendered capable of anſwering the purpoſes of commerce, and providing for the innumerable contingencies of private life[g]; and therefore the eſtate muſt not be ſo deviſed as to create what the law calls a perpetuity. As where a deviſe was made to the Drapers Company and their ſucceſſors in truſt, to convey the eſtate to the deviſor's grandſon *Matthew Humberſton* for life, and afterwards, on the death of the ſaid *Matthew*, to his ſon for life, and ſo to the firſt ſon of that firſt ſon for life, &c. and if no iſſue male of the firſt ſon, then to the ſecond ſon of the ſaid *Matthew Humberſton* for life, and ſo to the firſt ſon, &c. and in failure of ſuch iſſue of the ſaid *Matthew*, then to another *Matthew Humberſton* for life, and to his firſt ſon for life, &c. with remainders over to many of the *Humberſtons* (as the reporter thinks, about fifty) for their lives ſucceſſively and their reſpective ſons, when born, for their lives, without giving any eſtate in tail to any of them, or making any diſpoſition of the fee. This caſe being brought before the court of chancery, it was held by Lord Cowper, that this attempt to make a perpetual ſucceſſion of eſtates for life was vain and impracticable, and that there ought to be a ſtrict ſettlement made, and the intent of the teſtator followed as far as the rules of law would admit; and his lordſhip directed a ſettlement to be made, ſo that ſuch who were in being ſhould be only tenants for life; but where the limitation was to a ſon not in being, there he muſt be made tenant in tail[h]; who, when of age, may be enabled by ſuffering a recovery, if not by paſſing a fine, to ſell and convey the inheritance which a tenant for life cannot alone obtain power to do, as will be ſhewn hereafter, as alſo how real eſtates may be deviſed with remainders in tail[i].

g Black. Com. 2 V. 174.

h Gilb. on Wills, 159. Law of Teſt. 155.

i See Clauſe 5. Pag. 239—142.

WITH

WITH reſpect to executory deviſes, which will again be mentioned hereafter[k]; the utmoſt length that has been hitherto allowed for the contingency of an executory deviſe to happen in, is that of a life or lives in being, and one and twenty years afterwards; as when lands are deviſed to *ſuch* unborn ſon of a feme-covert *as* ſhall firſt attain the age of twenty-one, and his heirs; the utmoſt length of time that can happen before the eſtate can veſt, whereby the inheritance may be aliened or conveyed, being the life of the mother and the ſubſequent infancy of her ſon.

As to chattels real[l], which may be deviſed with limitations over; in order to prevent the danger of perpetuities, it has been ſettled that thoſe may be deviſed to one for life, and after his death to another for life, which is termed limiting over, and ſo to as many perſons as are in being; but all the perſons muſt be in being during the life of the firſt deviſee, or perſon to whom firſt deviſed, as then all the candles are lighted and conſuming together, and the ultimate remainder, as it is termed, is in reality only to that remainder-man who happens to ſurvive all the reſt[m].

LIMITATIONS of chattels perſonal[n], in remainder after a bequeſt for life, are in like manner permitted, though formerly that indulgence was only ſhewn where merely the uſe of the goods, and not the goods themſelves, was given to the firſt legatee, the property being ſuppoſed to continue all the time in the executor of the deviſor. But now that diſtinction is diſregarded; and if a man, either by deed or will, gives or deviſes his books or furniture to A for life, with remainder after the death of A to B; this remainder to B is good[o], and B may exhibit a bill againſt A to com-

k Pag. 149.
l Deſcribed, page 28, 29.
m Law of Teſt. 82. Black. Com. 2 V. 174.
n Deſcribed, page 28, 29.
o Black. Com. 2 V. 398.

pel him to give ſecurity that the goods ſhall be forthcoming at his deceaſe[p]. But if money is deviſed from one to another, the firſt perſon to whom it is deviſed is wholly entitled thereto; as where the teſtator had three daughters and deviſed to them 540l, equally to be divided, and if one of them died without iſſue, her part to go to the ſurvivors: one of them married and died without iſſue; and the huſband exhibiting a bill againſt the executor and the ſurviving ſiſters for his wife's part, being 180l; had a decree[q].

BY this it may be perceived, that notwithſtanding the law has veſted perſons with great power for diſpoſing of their real and perſonal eſtates by will, yet it has not left them to their own vain humour and caprice in diſpoſing thereof, but judiciouſly preſcribed bounds whereby thoſe eſtates may be rendered moſt beneficial to the ſucceeding generation; and upon thoſe principles, and to prevent the extenſive gifts in mortmain, corporations were excepted in the ſtatute 34 and 35 Hen. VIII. as the gift to a corporation which never dies muſt tend to a perpetuity.

IT having been held that the ſtatute 23 Hen. VIII. did not extend to any thing but ſuperſtitious uſes, and that therefore a man might give lands for the maintenance of a ſchool, an hoſpital, or any other *charitable* uſes; it was apprehended that perſons on their death-beds might make large and improvident diſpoſitions even for thoſe good purpoſes, and thereby defeat the political ends of the ſtatutes of mortmain; it is therefore enacted by the ſtatute 9 Geo. II. c. 36. that no manors, lands, tenements, rents, advowſons, or other hereditaments, corporeal or incorporeal, whatſoever, nor any ſum or ſums of money, goods, chattels, ſtocks in the publick funds, ſecurities for money, or any other perſonal eſtate whatſoever, *to be laid out or diſpoſed of in the purchaſe of any lands, tenements, or hereditaments*, ſhall be

[p] 2 Freeman, 206.

[q] 4 Burn's Eccleſ. Law, 144.

given,

given, limited, or appointed *by will*, to any perſon or perſons, bodies politick or corporate, or otherwiſe, *for any eſtate or intereſt whatſoever, or any ways charged or incumbered by any perſon or perſons whatſoever, in truſt or for the benefit of any charitable uſe whatſoever*; but ſuch gift ſhall be by deed indented, ſealed, and delivered in the preſence of two or more credible witneſſes twelve calendar months at leaſt before the death of ſuch donor, and be inrolled in the high court of chancery within ſix calendar months after the execution, and the ſame to take effect immediately after the execution for the charitable uſe intended, and be without any power of revocation, reſervation, or truſt for the benefit of the donor. And all gifts and appointments whatſoever *of any lands, tenements, or other hereditaments, or of any eſtate or intereſt therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or any perſonal eſtate, to be laid out in the purchaſe of any lands, tenements, or hereditaments, or any eſtate or intereſt therein, or of any charge or incumbrance affecting or to affect the ſame*, to or in truſt for any charitable uſe whatſoever, *made* in any other manner than is directed by this act, *ſhall be abſolutely null and void.* But the two univerſities, their colleges, and the ſcholars upon the foundation of the colleges of Eaton, Wincheſter, and Weſtminſter, are excepted out of this act; but with this proviſo, that no college ſhall be at liberty to purchaſe more advowſons than are equal in number to one moiety of the fellows or ſtudents upon the reſpective foundations.

UPON the conſtruction of this ſtatute it hath been determined, that if a man deviſeth his land, that is, real eſtate (which the law terms land, and agreeable thereto I have ſometimes uſed the word land, inſtead of the words real eſtate, which imply one and the ſame thing), to truſtees to be turned into money, and that money to be laid out in a charity, the deviſe is not good; for it is an intereſt ariſing out of land. So a deviſe of a mortgage or of a term for years

to

to a charity is not good. And if money be given to be laid out in lands, this is expreſsly within the act, but money given generally is not; concerning which more particular mention will be made, after we have treated on legacies, under a ſubſequent head[r].

CHAP. II.

Of making the Will.

THE power perſons have and may obtain for diſpoſing of their eſtates and effects by will, having now been treated on, and likewiſe the bounds preſcribed by the law as limits to that power; whereby ſome of the requiſites neceſſary to be obſerved in making the will may be perceived, we ſhall here proceed to treat on further requiſites neceſſary to be attended to; and firſt take notice of perſons who being under ſome ſpecial prohibition by law or cuſtom, as for want of ſufficient diſcretion, or for want of ſufficient liberty and free will, or on account of their criminal conduct, are obliged to die inteſtate; and then conſider the manner of making the will, whereby both real and perſonal eſtate is given or bequeathed, and where the will only concerns perſonal eſtate: who may be made executors, and of whom the teſtator ſhould beware of appointing; who may be deviſees, and take by deviſe; and the manner of their taking real and perſonal eſtate by the will: the manner of bequeathing to married women and infants, and of appointing guardians: conditions not to trouble executors, and for preventing indiſcreet marriages: the nature and effects of a gift in caſe of death; and of a nuncupative or verbal will.

As to perſons reſtrained from making wills for want of ſufficient diſcretion, ſome of thoſe are infants, ideots, and perſons of nonſane memory, who with married women are excepted out of the ſtatute 34 and 35 Hen. VIII. c. 5. before mentioned[s]; ſo that infants or perſons under twenty-

[r] See page 214.

[s] Pag. 127.

one

one years of age, who are ſtiled infants till then, cannot by will diſpoſe of their real eſtate; yet, as has been ſhewn, may thereby diſpoſe of their perſonal eſtate at certain ages. And aliens, who were mentioned in the third ſection of the fourth chapter of the former part of this work, as not being capable of holding lands [t], conſequently can never have any to diſpoſe of; yet aliens may acquire a property in goods, money, and other perſonal eſtate here in England, and diſpoſe thereof by will, provided they are alien-friends, or ſuch whoſe countries are at peace with ours [u].

AMONGST thoſe perſons diſabled from making wills for want of ſufficient diſcretion, as ideots and perſons of non-ſane memory, may be reckoned ſuch perſons as are grown childiſh by reaſon of old age or diſtemper, and ſuch as have their ſenſes befotted with drunkenneſs; all of whom are incapable, by reaſon of mental diſability, to make any will ſo long as ſuch diſability laſts. To theſe alſo may be referred ſuch perſons as are born deaf, blind, and dumb; who having always wanted the common inlets of underſtanding, are incapable of having, as it is termed, *animum teſtandi*; and therefore any will made by them is void [x].

AN IDEOT or natural fool, is he who notwithſtanding he be of lawful age, yet he is ſo witleſs that he cannot number to twenty, nor can tell what age he is of, nor knoweth who is his father or mother, nor is able to anſwer any ſuch eaſy queſtion; whereby it may plainly appear that he hath not reaſon to diſcern what is to his profit or damage, nor is apt to be informed or inſtructed by any other; and ſuch an ideot cannot make any teſtament, nor diſpoſe either of his lands or goods [y]. An old man, who, by reaſon of his great age, is grown childiſh again, or ſo forgetful,

[t] Pag. 97.

[u] Black. Com. 1 V. 372.

[x] *Ibid.* 2 V. 497.

[y] Law of Teſt. 41. 4 Burn's Eccleſ. Law, 44.

that

that he forgets his own name, cannot make a will; for a will made by ſuch an one is void [z]. A drunken man, when ſo exceſſively drunk as to be deprived of his reaſon and underſtanding, during that time may not make a will; for it is requiſite, when the teſtator makes his will, that he ſhould be of ſound memory, and that he hath a competent memory and underſtanding to diſpoſe of his eſtate with reaſon [a]. A man of a mean underſtanding, neither of the wiſe or fooliſh ſort, but indifferent, as it were, betwixt a wiſe man and a fool, and though he rather incline to the fooliſh ſort, ſuch an one is not prohibited to make a teſtament, unleſs he be yet more fooliſh, and ſo very ſimple, that he may be eaſily made to believe things incredible or impoſſible, and hath not as much wit as a child may have at ten or eleven years of age, who is therefore inteſtable by the law for want of judgment [b].

MADFOLKS and lunatick perſons, during the time of their furor or inſanity of mind, cannot make a teſtament, nor diſpoſe of any thing by will, becauſe they do not know any thing they do; for in making a teſtament, the integrity or perfectneſs of the mind, and not health of the body is requiſite [c]. And ſo ſtrong is this impediment of inſanity of mind, that if the teſtator makes his teſtament after his furor hath overtaken him, and whilſt it doth poſſeſs his mind, although the furor doth after depart or ceaſe, and the teſtator doth recover his former underſtanding, yet the teſtament made during his former fit doth not recover any force or ſtrength thereby [d]. But if a mad or lunatick perſon has a clear or calm mind, then during the time of ſuch his quietneſs and freedom of mind he may make his teſtament [e].

[z] Swinb. part 11. ſect. 1. 6 Co. R. p. 23.

[a] Swinb. part 11. ſect 1.

[b] *Ibid.* ſect. 4.

[c] Law of Teſt. 39. 4 Burn's Eccleſ. Law, 44.

[d] Law of Teſt. 39.

[e] *Ibid.* 4 Burn's Eccleſ. Law, 44.

EVERY

EVERY perſon is preſumed to be of ſound mind and memory unleſs the contrary be proved; and therefore, if any perſon goes about to overthrow a teſtament, by reaſon of inſanity of mind or want of memory, he muſt prove the impediment[f], which is a hard and difficult point: and therefore it is not ſufficient for the witneſſes to depoſe that the teſtator was mad or beſide his wits, unleſs they render or yield a ſufficient reaſon to prove this their depoſition, as that they did ſee him do ſuch things, or heard him ſpeak ſuch words, as a man having reaſon would not have done or ſpoken[g].

As perſons who are born blind, deaf, and dumb, are incapable of making any will, ſo likewiſe are thoſe who are deaf and dumb by nature; unleſs it appears by ſufficient arguments that ſuch perſon underſtandeth what a will means, and that he hath a deſire to make a will; for if he have ſuch underſtanding and deſire, then he may make his will by ſigns and tokens[h].

A BLIND PERSON may make a nuncupative will, by declaring his mind before a ſufficient number of witneſſes; and he may make his will in writing, provided it be read to him before witneſſes, and in their preſence acknowledged by him for his laſt will; but if a writing be delivered to a blind man, and he not hearing the ſame read, acknowledges it for his will, this will not be ſufficient; for it may be, if he had heard the ſame read, he would not have acknowledged it for his will[i]; therefore, the beſt and ſafeſt way in ſuch caſe is, that the will be read over to the teſtator, and approved by him in the preſence *all* the ſubſcribing witneſſes: yet the law of England doth not ſeem preciſely to

[f] Law of Teſt. 40. 4 Burn's Eccleſ. Law, 44.

[g] *Ibid.*

[h] Law of Teſt. 44. 4 Burn's Eccleſ. Law, 54.

[i] Law of Teſt. 45. 4 Burn's Eccleſ. Law, 55.

require

require this ſtrictneſs, if there be otherwiſe ſatisfactory proof of the will being read over to the blind man, as the ſingle oath of the writer hath been allowed ſufficient to prove the identity of the will [k].

THE ſame precautions as are neceſſary for authenticating a blind man's will, ſeem in like degree requiſite in the caſe of a perſon who cannot read; for though the law in other caſes may preſume that the perſon who executes a will knows and approves the contents of it, yet that preſumption ceaſeth where, by defect of education, he cannot read, or by ſickneſs is incapacitated to read the will at that time [l].

PERSONS for want of ſufficient liberty and free will being incapable of making wills as before mentioned, are the next claſs here to be conſidered, and the firſt of theſe I ſhall take notice of is a married woman.

A MARRIED WOMAN is utterly incapable of diſpoſing of her real eſtate, either by will or deed, as has been ſhewn [m]; and as to her chattels real and perſonal, the latter of thoſe we have ſeen immediately veſt in her huſband on the marriage, and the former he may make his own if he chooſes [n]; wherefore ſhe is incapable of diſpoſing thereof unleſs her huſband ſhould conſent to her ſo doing, which it is not likely he ſhould, as it would be very inconſiſtent to give her a power of defeating the law in this reſpect, by enabling her to bequeath thoſe chattels to another.

BY the huſband's conſent the wife may make a teſtament, and as the huſband before marriage frequently becomes bound in a bond, or covenants with ſome of the woman's friends to give her ſuch conſent, he is bound by his bond or covenant ſo to do; but unleſs ſuch conſent be given to

k 4 Burn's Eccleſ. Law, 55.
l *Ibid.*
m Page 96.
n Page 3. 129.

the

the particular will in queſtion, it will not be complete even though the huſband beforehand hath given her permiſſion to make a will; yet it ſhall be ſufficient to repel the huſband his general right of adminiſtering his wife's effects (which otherwiſe he has a right to[o]), and adminiſtration ſhall be granted to the wife's appointee [p], or the perſon appointed by the wife.

WHEN a married woman dies, who by will or writing hath diſpoſed of effects by power derived from a bond, ſettlement, or a will; before ſuch will or writing of the woman's is proved in the eccleſiaſtical court, the ordinary will require the huſband's conſent, either in perſon or by proxy, a perſon appointed by the huſband for that purpoſe, and if that cannot be obtained (as ſometimes the huſband will abſolutely refuſe ſuch conſent), then the ordinary will require the bond or ſettlement from which the wife derived her power, to be produced, and after abſtracting it, will grant a probate or adminiſtration, that is, if the wife hath appointed an executor, the ordinary will grant a probate; if the wife hath not appointed an executor, but made only a kind of teſtamentary diſpoſition in writing, then the ordinary will grant adminiſtration with ſuch teſtamentary diſpoſition annexed; and in caſe the huſband's conſent hath not been obtained, but inſtead thereof the bond or ſettlement hath been produced, the contents thereof iſſues with the probate or adminiſtration from the ordinary, and this will be attended with expence according to the length of the bond or ſettlement, which, if very long, the extraordinary expence will be conſiderable, perhaps upwards of 20l. wherefore it is beſt to obtain the huſband's conſent if it can be had.——If the wife diſpoſes by power derived from a will which hath been proved, and the huſband with-holds his conſent, the extraordinary expence of obtaining the probate or adminiſtration,

[o] See pag. 3.]

[p] Black. Com. 2 V. 498.

will be very trivial, to what it will be when the power is derived from a ſettlement of any conſiderable length.

BY this it may be perceived how marriage alters the power that a woman before the conſummation thereof has over her eſtate and effects; and in reſpect to a will, if ſhe ſhould have made any before marriage, the ſame can be of no effect after her marriage, that being a revocation in law, and entirely vacates the will [q]. If ſhe makes any will during marriage, and dies in her huſband's life-time, we have ſeen that it will be effectual with having her huſband's conſent, and being made purſuant to the power ſhe had for that purpoſe; but if ſhe makes her will during marriage, and ſurvives her huſband, it will not be effectual unleſs after her huſband's death ſhe approves and confirms the ſame, whereby it becomes as a new will [r]. If a married woman has any pin-money or ſeparate maintenance, it is ſaid ſhe may diſpoſe of her ſavings thereout by any writing in nature of a will without the controul of her huſband [s], and if ſhe ſurvives him, ſhall have it herſelf, and the ſame ſhall not be liable to her huſband's debts [t].

WHERE the wife hath goods in the right of another perſon as executrix or adminiſtratrix, and not as legatee, of theſe ſhe may by will appoint an executor, and ſuch will of the wife's does not require the huſband's conſent; for in default of her appointing an executor, the teſtator's next of kin will be entitled to the adminiſtration, as was mentioned in the former part of this work [u].

THAT ſufficient liberty and free will is neceſſary to the making a will, it may be obſerved that if the ſame is made by a perſon through fear in conſequence of threatening, and which being ſuch fear as may move a conſtant man, as the fear of death or bodily hurt, or of impriſonment, or the

q 4 Co. Rep. 60.
r 4 Burn's Eccleſ. Law, 47.
s Black. Com. 2 V. 499.
t 4 Burn's Eccleſ. Law, 49.
u Pag. 3.

loſs

loſs of all or moſt part of his goods, or the like; it will be ſet aſide: yet as to this no certain rule can be delivered, but it is left to the diſcretion of the judge, who will not only conſider the quality of the threatening, but alſo the perſon as well threatening as threatened; in the perſon threatening his power and diſpoſition; in the perſon threatened, the ſex, age, courage, puſillanimity, and the like. But if the teſtator afterwards, when there is no cauſe of fear, do ratify and confirm his will, the ſame is then good in law[x].

FRAUD or deception relating to a will of perſonal eſtate is examinable only in the ſpiritual or eccleſiaſtical court; but in reſpect of a real eſtate, it was decreed in the houſe of lords that a will thereof could not be ſet aſide in a court of equity for fraud or impoſition; but muſt be tried at law, being a matter proper for a jury to enquire into[y].

PERSONS incapable of making wills on account of their criminal conduct are the next claſs here to be conſidered; and the firſt of thoſe we ſhall take notice of are traitors.

A TRAITOR, or one who has judgment awarded againſt him for high treaſon, forfeits to the king all his lands and tenements of inheritance, whether fee-ſimple, or fee-tail, and all his right of entry on lands and tenements, which he had at the time of the offence committed, or at any time afterwards, to be for ever veſted in the crown; and alſo the profits of all lands and tenements, which he had in his own right for life or years, ſo long as ſuch intereſt ſhall ſubſiſt[z]: and a traitor, when convicted, is deprived of making any teſtament or other kind of laſt will, and if he has made any before, the ſame by the conviction becomes void in reſpect of his goods and chattels[a]; ſo

[x] Law of Teſt. 51. 4 Burn's Eccleſ. Law, 53.

[y] Law of Teſt. 51. 4 Burn's Eccleſ. Law, 54.

[z] Black. Com. 4 V. 381.

[a] 4 Burn's Eccleſ. Law, 55.

in reſpect of real eſtate after judgment is awarded purſuant to conviction.

FOR PETIT TREASON and FELONY, the offender alſo forfeits all his chattel intereſts abſolutely, and the profits of all eſtates of freehold during life; and after his death all his lands and tenements in fee-ſimple (but not thoſe in fee-tail) to the crown, and the king ſhall have them for a year and a day, and then the lord of the fee ſhall have them by way of eſcheat [b]; therefore, when a perſon is found guilty either of petit treaſon or felony, and judgment is awarded, on which his lands or real eſtates are forfeited, and his goods and chattels on conviction previous to the judgment, he can make no diſpoſition of either by will or deed; becauſe the law hath then diſpoſed thereof; yet a pardon will reſtore him to his former eſtate [c], as it doth a perſon attainted of high treaſon before mentioned.

THERE is a difference between conviction and judgment; conviction is when the offender is found guilty by a jury, on which, or ſoon after, judgment is awarded againſt him by the judge, and then he is ſaid by the law to be attainted; but before judgment is awarded the offender is aſked if he has any thing to offer why it ſhould not be awarded againſt him, which he ſometimes has, as exceptions to the indictment, and thereby the proceedings againſt him may happen to be ſet aſide. In many caſes where goods are forfeited there never is any attainder, which happens only where judgment of death or outlawry is given; therefore in thoſe caſes the forfeiture muſt be upon conviction or not at all [d].

LIKEWISE there is this difference between the forfeiture of lands or real eſtate, and the forfeiture of goods and chattels. The *former* has relation back to the time of the fact committed, ſo as to avoid all intermediate charges; the *latter* has no relation backward; ſo that thoſe only which a man hath

[b] Black. Com. 4 V. 385, 386.
[c] 4 Burn's Eccleſ. Law, 56.
[d] Black. Com. 4 V. 375. 387.

at

at the time of conviction ſhall be forfeited: Therefore a traitor or felon may *bona fide* ſell any of his chattels, real or perſonal, between the fact and conviction; yet if they be colluſively, and not *bona fide* parted with, merely to defraud the crown, the law (and particularly the ſtatute 13 Eliz. c. 5.) will reach them [e].

OBSTINATELY ſtanding mute on arraignment, where a perſon is indicted for felony or other crimes, amounts to a confeſſion, and will have the ſame effect as if the priſoner had been convicted by verdict or confeſſion of his crime [f].

As the forfeiture of lands or real eſtate ariſes only upon attainder, that is, upon the judge's awarding judgment, a *felo de ſe*, or perſon who wilfully kills himſelf, forfeits no lands of inheritance or freehold, becauſe he never is attainted as a felon [g]; and therefore if he has made any will of his lands, the ſame may paſs thereby to the deviſees: yet as to his goods and chattels, and the appointment of an executor, his will (if he hath made any) ſhall be void [h].

GAVELKIND lands, if the anceſtor be hanged, are never forfeited for felony, as hath been mentioned in the former part of this work [i].

AN OUTLAWED PERSON is out of the king's protection and out of the aid of the law, and although the outlawry be only for debt, his goods and chattels are forfeited ſo long as the outlawry ſubſiſts [k]; and if the action on which he was outlawed were not juſt, yet his goods and chattels are forfeited, becauſe of his contempt in not appearing; and therefore he cannot make his teſtament of his goods ſo forfeited. But a man outlawed for debt, or in a perſonal action, may in ſome caſes make executors; for he may have debts upon contract which are not forfeited to the king; and thoſe executors may have a writ of error to reverſe the outlawry [l].

[e] Black. Com. 4 V. 388.
[f] *Ibid.* 329.
[g] *Ibid.* 386.
[h] 4 Burn's Eccleſ. Law, 56.
[i] Page 100.
[k] Black. Com. 2 V. 499.
[l] Law of Teſt. 47. 4 Burn's Eccleſ. Law, 56.

PAPISTS, till of late years, were under divers diſabilities in reſpect to taking lands either by purchaſe, deſcent, or deviſe [m]; but now by their complying with the ſtatute 18 Geo. III. c. 60. and taking the oath therein preſcribed, thoſe diſabilities are removed. ——With reſpect to aliens, it hath already been ſhewn that thoſe are incapable of holding any real eſtate [n].

THUS having taken notice of the perſons reſtrained from making wills, as being under ſome ſpecial prohibition by law or cuſtom; we come now to conſider the manner of making the will, whereby both real and perſonal eſtate is given or bequeathed, and where the will only concerns perſonal eſtate. Who may be made executors, and of whom the teſtator ſhould beware of appointing. Who may be deviſees and take by deviſe, and the manner of their taking real and perſonal eſtate by the will. And here we ſhall firſt obſerve the rules for the conſtruction of wills, and in what manner eſtates in fee-ſimple, fee-tail, or for term of life only, may be created; likewiſe the date of the will, and what is requiſite, with reſpect to the teſtator's ſigning thereof, and witneſſes ſubſcribing their names thereto.

IT is a rule in the conſtruction of wills, that the ſame be moſt favourably expounded, to purſue if poſſible the will of the teſtator, who for want of advice or learning may have omitted the legal and proper phraſes. And therefore many times the law diſpenſes with the want of words in deviſes, which are abſolutely requiſite in all other inſtruments; and hereby a fee may be conveyed without the words of inheritance, and an eſtate-tail without words of procreation [o], as we ſhall again ſee hereafter. But notwithſtanding the mind of the teſtator if poſſible ſhould be purſued, yet it muſt be ſo as his intent might ſtand with the rules of the law and not be repugnant thereunto, it being a rule that the laſt will of the teſtator is to be fulfilled according to his true intention,

m Black. Com. 2 V. 257. 293.
n Page 139.
o Black. Com. 2 V. 381.

but

but the ſpirit of the law is to be preſerved [p]; therefore when the teſtator endeavours to make a ſettlement of his eſtate contrary to the reaſon and policy of the law, the judges will reject it [q]; and herewith agrees what has been mentioned concerning the diſpoſal of eſtates in ſuch manner as the ſame may not thereby be rendered unalienable after a certain time. ——The intention of the teſtator muſt be collected from the will itſelf, and not from any parol evidence concerning it [r].

FAVOUR is alſo ſhewn with reſpect to wills in that what the law calls executory deviſes, which is the limitation of a future intereſt, not to take place immediately on the death of the teſtator, but at a time and under circumſtances appointed by the will; as when a man deviſes a future eſtate to ariſe upon a contingency, and till that contingency happens does not diſpoſe of the fee-ſimple, but leaves it to deſcend to his heir at law; as if one deviſes land to a feme-ſole or unmarried woman and her heirs upon her day of marriage: here is in effect a contingent remainder without any particular eſtate to ſupport it; a freehold commencing *in futuro*, or at a future time. This limitation, though void in a deed, yet is good in a will by way of executory deviſe [s]. On the ſubject of executory deviſes much might be ſaid; but, as it is a doctrine that cannot be underſtood only by ſuch as are well verſed in the law, unleſs fully explained, I ſhall here briefly obſerve that an executory deviſe ſeldom or ever happens, when the will is made with good advice and due conſideration; and proceed to ſhew, that, in reſpect to real eſtate, if the teſtator makes no other diſpoſition thereof than the law would have done, had he been ſilent, the deviſe will be rejected; as if I give land to my ſon and his heirs, or to John Syms and his heirs, and my ſon or John Syms is my heir at law, this deviſe will be void, and my heir ſhall take the land by deſcent, as his better title; for the deſcent ſtrengthens his title, by taking away the entry of ſuch as may poſſibly have right to the eſtate [t]; whereas, if he claims by deviſe, he is in by purchaſe, as heretofore ſhewn [u]. So, if I deviſe land to my wife for her life, and after her death

[p] Shep. Touch. 426.
[q] Gilb on Wills, 112.
[r] 2 Atk. 372
[s] Black. Com. 2 V. 172.
[t] Gilb. on Wills, 112. Law of Teſt. 153.
[u] Page 69, 89.

the ſame land in fee-ſimple to my ſon, who is my heir at law, or if I deviſe it to my executors for a term of years, and after the expiration thereof to my ſon in fee-ſimple; in neither of theſe caſes ſhall he take the land by the will; becauſe, if no ſuch deviſe had been made, he would have had the land after the death of my wife [b], or after the expiration of the term of years. But, if I create another eſtate by my will than would have deſcended to my heir at law, or where the quality of my eſtate is altered by the deviſe, there the diſpoſition of the will ſhall prevail though it be made to the heir at law; as where a man may have a ſon and a daughter, and deviſeth that his land ſhall deſcend to his ſon, and if he die without iſſue of his body, that then the ſame ſhall go over to the daughter: the ſon by this deviſe takes an eſtate tail, though heir at law to the deviſor; becauſe here is an eſtate tail created by the will, and the heir muſt take under the will, or the remainder to the daughter would be void. So where a man may have three daughters, his only iſſue, and deviſeth his land to them and their heirs, this deviſe, though to the heirs at law, is good; becauſe it makes them joint-tenants, in which ſurvivorſhip takes place, as we have lately ſeen [c]; whereas, had the daughters taken by deſcent, they had been co-parceners [d]; and the will altering the quality of the eſtate ought to prevail [e].

THOSE deviſes are alſo void and rejected where the words of the will are ſo general and uncertain that the teſtator's meaning cannot be collected from them; therefore, where a man by his will deviſed by theſe words, *I give all to my mother*, it was held that the lands did not paſs; for the words were too uncertain, and not ſufficient to diſinherit an heir [f]; it being a rule that the heir at law has a plain and uncontroverted title unleſs the anceſtor diſinherits him, and it would be unreaſonable to ſet him aſide, unleſs the intent of the anceſtor is evident from the will.

[b] Gilb. on Wills, 113. Law of Teſt. 153.
[c] Page 129.
[d] Mentioned page 88.
[e] Gilb on Wills, 114. Law of Teſt. 154.
[f] Gilb. on Wills, 115.

THE

THE words in a will whereby perſons may take an eſtate in fee-ſimple, fee-tail, or for term of life only, are ſo various, I ſhall omit entering into a diſcuſſion thereof, and briefly obſerve, that, in the conſtruction of wills, which are to be ſo favourably expounded as to purſue if poſſible the will of the teſtator, as has juſt been mentioned, the law many times diſpenſes with the want of words in deviſes that are abſolutely requiſite in all other inſtruments; wherefore a fee may be conveyed without words of inheritance, and an eſtate tail without words of procreation. The uſual words for conveying a fee-ſimple, either by deed or will, are *heirs and aſſigns for ever*; but by a devile to a man for ever, or to one and his aſſigns for ever, or to one in fee-ſimple, the deviſee hath an eſtate of inheritance, although the deviſor hath omitted the legal words of inheritance [g]. So in reſpect to an eſtate tail, the uſual words for creating it either by deed or will, are, I give to J. S. (or whoever he may be) *and the heirs of his body*; but in wills an eſtate tail may be created by a deviſe to a man and his children [h], or to a man and his ſeed, though the word of procreation, *viz. body*, be omitted [i].

WHERE it is intended a man ſhould have only an eſtate for life, the uſual method, both in deeds and wills, is, to convey the eſtate by the words *during the term of his natural life*, and then for preſerving contingent remainders, to veſt the ſame in truſtees [k]; which is abſolutely requiſite in a deed, with reſpect to its validity, and in a will it is neceſſary; for according to the rule laid down by lord Coke, though an expreſs eſtate for life is given to the anceſtor, with a limitation to the heir or heirs of his body, or his iſſue, yet regularly the anceſtor takes an eſtate tail [l]; and by Sir James Burrow's reports: If a deviſe be to one for life, and afterwards a limitation, either immediate or mediate, to the heirs of his body, the deviſee takes an eſtate tail [m], whereby a father, if not prevented, may ſecure the eſtate to himſelf, and deprive his children thereof.

g Black. Com. 2. V 108.
h Gilb. on Wills, 33.
i Black. Com. 2 V 115.
k As in N° 7, Clauſe 7, Page 240.
l 1 Co. Rep. 99.
m Burr. Manſf. 1631.

As to the date of the will, no teſtament being of any effect till after the death of the teſtator, therefore if there be many teſtaments the laſt overthrows all the former, as we ſhall again ſee under a ſubſequent head [n]; but the republication of a former revokes one of a later date, and eſtabliſhes the firſt again. And if there be two clauſes in a will ſo totally repugnant to each other that they cannot ſtand together, the latter ſhall be received and the former rejected: wherein it differs from a deed; for there of two ſuch repugnant clauſes the former ſhall ſtand. Which is owing to the different natures of the two inſtruments; for the laſt will and the firſt deed is always moſt available in law. Yet in both caſes we ſhould rather attempt to reconcile the repugnant clauſes [o].

IN making a will where any real eſtate is intended to paſs thereby, due attention muſt be had to the ſtatute 29 Car. II. c. 3. (commonly called the ſtatute of frauds), which directs that all deviſes of lands and tenements ſhall not only be in writing, but ſigned by the teſtator, or ſome other perſon in his preſence and by his expreſs direction; and be ſubſcribed in his preſence by three or four credible witneſſes.

In the conſtruction of this ſtatute it has been adjudged that the teſtator's name, written with his own hand, at the beginning of his will, as, "I John Mills do make this my laſt will "and teſtament," is a ſufficient ſigning, without any name at the bottom; though the other is the ſafer way. It has alſo been determined, that though the witneſſes muſt all ſee the teſtator ſign, or at leaſt acknowledge the ſigning, yet they may do it at different times. But they muſt all ſubſcribe their names as witneſſes *in his preſence*, leſt by any poſſibility they ſhould miſtake the inſtrument [p]. It has likewiſe been determined that a will is good though none of the witneſſes ſaw the teſtator *actually ſign it*, if he owns

[n] Page 168.
[o] Black. Com. 2 V. 381. 502.
[p] *Ibid.* 377.

it

it before them to be his hand-writing; and it is obſervable that the ſtatute of frauds does not ſay the teſtator ſhall ſign his will in the preſence of three witneſſes, but requires theſe three things; firſt, that the will ſhould be in writing; ſecondly, that it ſhould be ſigned by the teſtator; and thirdly, that it ſhould be ſubſcribed by three witneſſes, in the preſence of the teſtator [q]. But it is not neceſſary that the witneſſes ſhould be acquainted with the contents of the will [r]. And, although the ſtatute requires that the witneſſes to the will ſhall ſubſcribe their names in the teſtator's preſence (to prevent obtruding another will in the place of the true one), yet it is ſufficient if the teſtator *might* ſee, it not being abſolutely requiſite that he *ſhould* actually ſee them ſigning; for, at that rate, if a man ſhould but turn his back, or look off, it might make the will void. And where the teſtator deſired the witneſſes to go into another room ſeven yards diſtant to atteſt his will, in which there was a window broken through, whereby he might ſee them, it was adjudged by the court to be a witneſſing in his preſence [s]. So, where a will was atteſted by witneſſes in an attorney's office, when the teſtatrix was in her carriage, where ſhe might ſee them through the windows thereof and of the attorney's office, it was adjudged to be well atteſted [t].

THE witneſſes ſhould be entirely diſintereſted perſons, and ſuch as can receive no benefit or advantage by the will, and if there is any freehold eſtate deviſed thereby, there muſt, as has been ſhewn, be three of them; but, if the will concerns only perſonal eſtate, two witneſſes will be ſufficient, concerning which ſomewhat more will preſently be mentioned.

A WITNESS either to the execution of a will or codicil ſhould have no legacy given him thereby, neither ſhould he be a creditor of the teſtator, eſpecially where, as is often the caſe, the land deviſed by the will is made ſubject to the payment of debts. For by the ſtatute 25 Geo. II. c. 6. all legacies given to witneſſes are declared void. And in a caſe before

[q] Caſe of Stonehouſe and Evelyn, 3 P. Will. 254.

[r] Caſe of Ellis and Smith, 5 Bac. Abr. 509. 4 Burn's Eccleſ. Law, 173.

[s] 2 Salk. 688.

[t] Caſe of Caſſon and Dade, H. 1781. Brown's Cha. Rep. 99.

the

the court of king's bench, in Mich. term, 31 Geo. II. where all the ſubſcribing witneſſes were creditors of the teſtator at the time of executing his will, it was urged that their being creditors of the teſtator invalidated their teſtimony, and that notwithſtanding their debts were paid them before the time of trial; although the court in this caſe determined that a benefit given to a ſubſcribing witneſs ſhould not annul his atteſtation, if, at or after the teſtator's death, the witneſs be diſintereſted [u]. However, it is ſafeſt to have perſons for witneſſes who are quite diſintereſted; as here we ſee legatees thereby loſe their legacies: and as to creditors, though their teſtimony will be admitted on a trial, yet their credit will be then left (like that of all other witneſſes) to be conſidered on a view of all circumſtances by the court and jury.

WHERE the will concerns only perſonal eſtate, if the ſame be written in the teſtator's own hand, though it has neither his name nor his ſeal to it, nor witneſſes preſent at its publication, it is good; provided ſufficient proof can be had that it is the teſtator's hand-writing. And if written in another man's hand, and never ſigned by the teſtator, yet, if proved to be according to his inſtructions, and approved by him, it hath been held good for the perſonal eſtate. But it is the ſafer and more prudent way, and leaves leſs in the breaſt of the eccleſiaſtical judge, if it be ſigned or ſealed by the teſtator, and publiſhed in the preſence of witneſſes [w]. When the witneſſes are omitted, the ordinary, before he grants probate, will require the teſtator's hand-writing to be proved, or, if another perſon wrote his will, that the writing or will produced is his will; whereby not only five or ſix and twenty ſhillings extraordinary expence will be occaſioned, but perhaps a deal of trouble to the executor in procuring ſufficient proof.

WHERE the will only concerns copyhold lands, the ſame having been ſurrendered to the uſe of the will, although the will be not atteſted by any witneſſes, it ſhall direct the uſes of the ſurrender; for the ſtatute of frauds, which requires the teſtator's ſigning in the preſence of three witneſſes, is

[u] 4 Burr. Rep. 430.

[w] Black. Com. 2 V. 501.

confined only to ſuch eſtates as paſs by the ſtatute of wills of the 34 and 35 Hen. VIII. which doth not extend to copy-holds.

WITH reſpect to perſons who may be made executors, all perſons are capable of being executors that are capable of making wills, and many others beſides; as feme-coverts, and infants, nay, even infants unborn, or *in ventre ſa mere*, that is, in the mother's womb, may be made executors. But no infant can act as ſuch till the age of ſeven years; till which time adminiſtration muſt be granted to ſome other, *durante minore ætate*, or during the minority [x]. Yet, if there be two executors, one whereof is under age, he of full age may ſolely prove the will [y].

ALTHOUGH there are very few perſons but may be made executors, yet it behoves the teſtator to beware of whom he appoints executor; for, if a creditor conſtitutes his debtor his executor, it is a releaſe or diſcharge of the debt, whether the executor acts or no; provided there be aſſets ſufficient to pay the teſtator's debts: for, though this diſcharge of the debt ſhall take place of all legacies, yet it will not be allowed againſt the teſtator's creditors [z]. If there be ſeveral joint debtors, and the creditor makes one of them executor, the debt is extinct in law [a]; and if the huſband of a woman that is made executor be indebted to the teſtator, this making of the wife executor is a releaſe in law [b]. Formerly it was a ſettled notion, that where there was no reſiduary legatee appointed by the will, the ſurplus or *reſiduum* devolved to the executor's own uſe, by virtue of the executorſhip. But now there is this reſtriction, that, although where the executor has no legacy at all, the reſiduum ſhall in general be his own, yet wherever there is a ſufficiency on the face of a will (by means of a competent legacy or otherwiſe) to imply that the teſtator intended his executor ſhould *not* have the reſidue, the undeviſed ſurplus of the eſtate ſhall go to the next of kin; the executor then ſtanding

x Black. Com. 2 V. 503.

y 1 Lev. 181. mentioned again hereafter, page 193.

z Black. Com. 2 V. 512.

a Went. Off. Exec. 31, 32.

b *Ibid.* 207.

upon

upon exactly the ſame footing as an adminiſtrator, who by the ſtatute 22 and 23 Car. II. c. 10. muſt make diſtribution thereof to the inteſtate's next of kin [c]; and for making this diſtribution it may be obſerved that an executor is compellable thereto by the court of chancery [d]; where, of late it has been determined, that, if there be no kindred, the executor ſhall ſtand truſtee for the crown, to whom the undeviſed ſurplus ſhall go [e], as in the caſe of a perſon dying wholly inteſtate, before mentioned [f].—Much litigation having been with reſpect to executors claiming the undeviſed ſurplus, further mention will be made thereof, under a ſubſequent head [g].

THERE are very few perſons but may be deviſees, or legatees, and take either real or perſonal eſtate by deviſe; the latter of which, on the teſtator's death, veſts in the executor, and cannot be taken without his conſent [h], he being the perſon to anſwer the teſtator's creditors; but with the former, an executor, as ſuch, has no more concern than an adminiſtrator heretofore mentioned [i]; for, on the teſtator's death, the real eſtate immediately veſts in the deviſee, or perſon to whom it is deviſed [k]; whereby formerly great inconveniencies aroſe, as creditors by bond and other ſpecialties were defrauded of their ſecurities, not having a remedy againſt the *deviſee* of their debtor; to obviate which the ſtatute 3 W. and M. c. 14. was made, and thereby the deviſe, as againſt ſuch creditors, is deemed void, and they are enabled to maintain their actions jointly againſt both the heir and deviſee, as has been ſhewn [l].

A MARRIED woman, or as the law terms her, a femecovert, although ſhe cannot be a grantee to her huſband, as a man cannot grant any thing by deed to his wife, or enter into covenant with her; for that would be to ſuppoſe her ſeparate exiſtence; but a woman may be attorney for her huſband, as that implies no ſeparation; and an huſband may bequeath any thing to his wife by will; for that cannot take effect till the coverture is determined by death [m].

c Black. Com. 2 V. 514.
d Page 63.
e Caſe of Middleton and Spicer, H. 1783. Brown's Cha. Rep. 201.
f Page 84.
g See page 183.
h Black. Com. 2 V. 512.
i Page 86.
k Co. Litt. 111.
l Page 93.
m Black. Com. 1 V. 442.

AN infant *in ventre ſa mere*, or in the mother's womb, is ſuppoſed in law to be born for many purpoſes. It is capable of having a legacy, or a ſurrender of a copyhold eſtate made to it. It may have a guardian aſſigned to it, and it is enabled to have an eſtate limited to its uſe, and to take afterwards by ſuch limitation as if it were then actually born; and if a deviſe is to children and grandchildren living at the time of the teſtator's death, a child in the mother's womb might in ſuch caſe be ſo far regarded as to be looked upon as living [n], and will have the ſame ſhare as any child born before the teſtator's death. But this muſt be underſtood with reſpect to legitimate children, and not of baſtards, heretofore deſcribed [o]; for a deviſe to thoſe in the mother's womb, or before born, is void [p]. Yet, if a baſtard is born at the time of making the will, whereby either real or perſonal eſtate is given to him, he is capable of taking the ſame; but it is ſafe to deſcribe a baſtard, in the will, as the natural ſon or daughter of A. B. [his mother], eſpecially if he be a tender infant, that has not got a name by reputation. ——Aliens, we have ſeen, are not capable of holding lands [q]; and, with reſpect to ſome perſons incapable of taking a legacy, mention will be made under a ſubſequent head [r].

HAVING thus conſidered thoſe propoſitions, we ſhall now proceed to conſider the manner of bequeathing to married women and infants, and of appointing guardians: conditions not to trouble executors, and for preventing indiſcreet marriages.

WHEN any eſtate or effects is intended for a married woman, it is generally deviſed or bequeathed to ſome perſon in truſt for her, or to be for her ſole and ſeparate uſe, with directions that her receipt alone ſhall be a ſufficient diſcharge for the ſame; as thereby to prevent what is given being ſubject to the huſband's control: If any real eſtate is deviſed to her in fee-ſimple, and without any reſtriction, it immediately veſts in her on the teſtator's death, and will have the ſame effect as to the huſband's curteſy and being conveyed by virtue of a fine, as heretofore ſhewn [s]. But if any legacy or perſonal eſtate is given

[n] 4 Burn's Eccleſ. Law. 146.
[o] Pag. 84.
[p] Gilb. on Wills, 161.
[q] Page 139.
[r] Page 205.
[s] Page 94—96.

to

is given to a married woman abſolutely without any reſtriction, it will be as if the ſame were given to the huſband, as we ſhall ſee under a ſubſequent head[t]. And when any real eſtate is intended for an infant, it is uſual to deviſe it to ſome perſon or perſons in truſt for him till he attain twenty-one years of age, with directions to the truſtees how to manage the ſame in the interim. So with reſpect to any legacy or perſonal eſtate that may be bequeathed to an infant; for the law will not truſt an infant with any real eſtate; and as to legacies or perſonal eſtate, where the teſtator has not taken neceſſary care to preſerve it for an infant, the courts wherein legacies are to be ſued for, when applied to, are not negligent in taking the utmoſt care for the benefit of infants[u]; the expence of which application may be ſaved by due care being taken in making the will. Truſtees named in the will may alſo be appointed guardians by any father, who we have ſeen, hath power to diſpoſe of the cuſtody of his children[w]; and the ſame, or ſuch others as the teſtator ſhall chooſe, may be made executors. In default of the father's appointing a guardian, infants at fourteen years of age, whether male or female, may chooſe their own guardian; and for the perſonal eſtate, the ordinary uſually aſſigns him, but for the real eſtate, it is the province of the lord chancellor to aſſign a guardian. The power and reciprocal duty of guardian and infant, who is termed in law the ward, during the continuance of the guardianſhip, are the ſame as that of father and child; and the infant cannot be ſued, but under the protection and joining the name of his guardian, he being to defend him againſt all attacks, as well by law as otherwiſe; and when the infant comes of age, muſt give him an account of all that he hath tranſacted on his behalf, and anſwer for all loſſes occaſioned by his wilful delay or negligence. But an infant is allowed to ſue either by his guardian or *parchein amy*, that is, his next friend, who may be any perſon that will undertake his cauſe[x]; and it frequently happens that an infant inſtitutes a ſuit in equity againſt a fraudulent guardian, who, if he hath abuſed his truſt, the court will check and puniſh, and ſometimes proceed to the removal of him, and appoint another in his ſtead.—To prevent diſagreeable conteſts with young gentlemen, it has become

[t] Page 213.
[u] See page 210, 211, 212.
[w] Page 102.
[x] Co. Litt. 135. Note 1. 13 Edit.

a practice

a practice with many guardians, of large eſtates eſpecially, to indemnify themſelves by applying to the court of chancery, acting under its direction, and accounting annually before the officers of that court[y].

As to conditions not to trouble executors, if a legacy is given on condition not to diſpute the will, and the legatee commences a ſuit whereby he diſputes the validity of the will, this is no forfeiture of the legacy, if there was juſtifiable cauſe of conteſting it[z]. And even though there is no probable cauſe, yet where a legatee, or other perſon intereſted, hath a right to ſee the will proved in ſolemn form[a], his making uſe of the right cannot, as it ſeems, be deemed a diſturbance.—The teſtator gives to B a legacy on pain of forfeiture of it, in caſe he ſhould give his wife, whom he made executrix, any trouble in relation to his eſtate; B. brings his bill againſt the wife, for which there was very little colour, and amongſt other things demands his legacy. The chancellor was of opinion that the ſuit was very frivolous, but would not declare the legacy forfeited[b]. But in a caſe where a perſon by his will gave a legacy to his daughter, provided that if ſhe or her huſband refuſed to give releaſe, or ſhould put the executor to any trouble, the ſame ſhould go over to her ſiſter's children. The daughter and her huſband, being within the city of London, ſue for her orphanage part. Decreed that the legacy was forfeited; for however it might have been conſtrued to be only *in terrorem*, yet being deviſed over, and by that means a right to this legacy being veſted in a third perſon, a court of equity could not diveſt it or call it back again[c].

GENERALLY, by the eccleſiaſtical law, all conditions againſt the liberty of marriage are unlawful, as being a reſtraint on the natural liberty of mankind, and an hinderance to the propagation of the ſpecies; and if the condition be that the legatee marry according to the appointment, arbitrament, or conſent of ſome other perſon, it is rejected as unlawful[d]. But if the conditions are only

[y] Black. Com. 1 V. 463.
[z] 3 New. Abr. 479.
[a] The manner thereof, ſee page 187.
[b] Cha. Ca. King, 1.
[c] Caſe of Cleaver and Spurling, 2 P. Will. 258.
[d] Godolphin's Orphan's Legacy, 45.

ſuch

ſuch as whereby marriage is not abſolutely prohibited, but only in part reſtrained, as in reſpect of time, place, or perſon, then ſuch conditions are not abſolutely rejected [e]; as for inſtance, where the condition is not to marry before the age of twenty-one years: but if it is continued to an unreaſonable length of time, it is otherwiſe. So if the condition be not to marry a particular perſon, or a widow, or one of any particular place, it is to be performed [f].

IN the temporal courts, the diſtinction ſeems generally to have been where the legacy is deviſed over to another, and where it is not deviſed over. In the former caſe it hath been held that the reſtraint ſhall be good, ſo as the legacy ſhall not be due, unleſs the condition be performed; but in the latter caſe, where there is no deviſe over, it hath been held that the proviſo or condition is only *in terrorem*, to make the perſon careful, but not to defeat the legacy [g]. Yet here there is a diſtinction between its being charged on real eſtate and where it is not; as if a legacy be given to a woman upon this condition, that ſhe marry with the conſent of a third perſon, who, as it may be a parent, guardian, truſtee, or executor, and the legacy be to be raiſed out of a real eſtate; in this caſe, if ſhe marry without ſuch conſent, although there is no deviſe over, ſhe ſhall not have it [h]. But if it is a mere perſonal legacy, payable out of the perſonal eſtate, and there be no deviſe over, in caſe ſhe marry without ſuch conſent, ſhe will be entitled to it, unleſs there be a deviſe over; and then it ſhall go to whom it is ſo deviſed, and ſhe will loſe it [i]. The reaſon of this diſtinction is, becauſe the temporal courts, where the legacy is merely perſonal, and only a charge on the perſonal eſtate, follow the rule of the eccleſiaſtical courts, which hath juriſdiction as to the perſonality: but where it is charged on real eſtate, of which the eccleſiaſtical court hath no juriſdiction, they follow the rule of the common law courts; which is ſimilar to what we ſhall again ſee hereafter under a ſubſequent head [k].

[e] Godolphin, O. L. 45.
[f] *Ibid.*
[g] Cha. Ca. 22. 1 Vern. 20.
[h] Caſe of Pulling and Reddy, 1 Wilſon's Rep. 21.
[i] Caſe of Reyniſh and Martin, 3 Atk. 330.
[k] Pag. 207.

THUS

THUS having proceeded, we come now to the two laſt propoſitions under the head of making the will, viz. the gift in caſe of death, and the nuncupative or verbal will.

A GIFT IN CASE OF DEATH, which is called *donatio cauſa mortis*, is, when a perſon in his laſt ſickneſs, apprehending his diſſolution near, delivers, or cauſes to be delivered, the poſſeſſion of any perſonal goods to another, to be his in caſe the giver die; but if he lives he is to have them again, as being only given in contemplation of death[l]; and this, notwithſtanding there may be a will ſubſiſting, the teſtator may do, for he might in his lifetime, after making his will; give away any part of his eſtate, either abſolutely or conditionally; and ſuch gift as given in contemplation of death, if the donor dies, needs not the aſſent of his executor: yet it ſhall not prevail againſt creditors[m]; for being given in caſe of the donor's death, and in nature of a legacy, it would be fraudulent as againſt creditors[n]. Under perſonal goods before mentioned, may be included not only money, plate, and jewels, but alſo bonds and bills drawn by the deceaſed upon his banker, the gift whereof after the donor's death hath been held ſufficient for receiving the money due thereon[o].

A NUNCUPATIVE or VERBAL WILL, is, where the teſtator, without any writing, doth declare his will before a ſufficient number of witneſſes, and this can extend only to perſonal eſtate; for no real eſtate can paſs by the will, unleſs it is written and atteſted in ſuch manner as has lately been ſhewn. Thoſe verbal wills were formerly more in uſe than at preſent, when the art of writing is become more univerſal; and as they are liable to great impoſitions, and may occaſion many perjuries, the ſtatute 29 Car. II. c. 3. enacts, 1. That no written will ſhall be revoked or altered by a ſubſequent nuncupative one, except the ſame be in the lifetime of the teſtator reduced to writing, and read over to him and approved; and unleſs the ſame be proved to have been ſo done by the oath of three witneſſes at the leaſt, who

[l] Black. Com. 2 V. 514.
[m] *Ibid.*
[n] 1 P. Will. 406.
[o] Law of Teſt. 188. 4 Burn's Eccleſ. Law, 188.

by the ſtatute 4 & 5 Ann. c. 16. muſt be ſuch as are admiſſible upon trials at common law. 2. That no nuncupative will ſhall in any wiſe be good, where the eſtate bequeathed exceeds 30l; unleſs proved by three ſuch witneſſes preſent at the making thereof; and unleſs they or ſome of them were ſpecially required to bear witneſs thereto by the teſtator himſelf; and unleſs it was made in his laſt ſickneſs, in his own habitation or dwelling-houſe, or where he had been previouſly reſident ten days at the leaſt; except he be ſurprized with ſickneſs on a journey, or from home, and dies without returning to his dwelling. 3. That no nuncupative will ſhall be proved by the witneſſes after ſix months from the making, unleſs it were put in writing within ſix days; nor ſhall it be proved till fourteen days after the death of the teſtator, nor till proceſs hath firſt iſſued to call in the widow or next of kin to conteſt it if they think proper.

HENCE we may perceive, that this will extends only to perſonal eſtate: That the teſtamentary words by which it is to be made muſt be ſpoken with an intent to bequeath, not any looſe idle words in the ſick perſon's illneſs; for he muſt require the by-ſtanders to bear witneſs of ſuch his intention: That it muſt be made at home, or among his family or friends, unleſs by unavoidable accident to prevent impoſitions from ſtrangers; and it muſt be in his *laſt* ſickneſs, for if he recovers he may alter his diſpoſition, and has time to make a written will: That it muſt not be proved after ſix months from the making, unleſs it were put in writing within ſix days from that time; nor yet too haſtily, as not until fourteen days after the teſtator's death, nor till legal notice hath been given to his widow or next of kin.

THE legiſlature having thus provided againſt any frauds in ſetting up nuncupative wills, by ſuch a numerous train of requiſites, that the thing itſelf is fallen into diſuſe, and hardly ever heard of, but in the only inſtance where favour ought to be ſhewn to it when the teſtator is ſurprized by ſudden and violent ſickneſs [P].

[P] Black. Com. 2 V. 501.

CHAP.

CHAP. III.

Of revoking the Will.

THAT a man may alter or make void his will at pleaſure, and although he may have made his laſt will and teſtament irrevocable in the ſtrongeſt words, he is at liberty to revoke it[a], moſt people ſeem appriſed of; but how a will may be revoked by acts in law and alteration of circumſtances, very few perſons have any juſt conception; and as many, after having made their will, have made alterations in their eſtate, and died without altering or republiſhing their will, and thereby left their eſtates and effects open to diſpute and litigation; I ſhall here, after taking notice of the ſtatute 29 Car. II. point out various acts that may be done by a teſtator, ſo as to occaſion either a total or partial revocation of his will; and then make ſome obſervation on the means whereby the revocation might be rectified, and on the nature and effect of a codicil, and the republication of a will; and conclude the head with ſhewing how, in various caſes, a perſon may die both teſtate and inteſtate, and thereby part of his eſtate be diſpoſed of by himſelf, and the other part by the law.

BY ſtatute 29 Car. II. c. 3. with reſpect to real eſtates, it is enacted that no deviſe in writing of lands, tenements, or hereditaments, or any clauſe thereof, ſhall be revocable, otherwiſe than by ſome other will or codicil in writing, or other writing declaring the ſame, or by burning, cancelling, tearing, or obliterating the ſame by the teſtator himſelf, or in his preſence, and by his directions and conſent; but all deviſes and bequeſts of lands and tenements ſhall remain and continue in force until the ſame

[a] 8 Co. Rep. 82.

be burnt, cancelled, torn, or obliterated by the teſtator or by his directions in manner aforeſaid, or unleſs the ſame be altered by ſome other will or codicil in writing, or other writing of the deviſor ſigned in the preſence of three or four witneſſes declaring the ſame. And as to perſonal eſtate, we have ſeen in the latter part of the foregoing head, that no will in writing concerning any goods, chattels, or perſonal eſtate, ſhall be repealed, nor ſhall any clauſe, deviſe, or bequeſt therein be altered or changed by any words or will by word of mouth only; except the ſame be in the lifetime of the teſtator committed to writing, and after the writing thereof read to the teſtator and allowed by him, and proved to be ſo done, by three witneſſes at the leaſt [b].

BUT this ſtatute has not taken away revocations of laſt wills by acts in law; as if the teſtator ſhould afterwards make a feoffment or conveyance contrary to the will, or any other act inconſiſtent with it, but ſuch revocations remain as they were before the making this ſtatute [c]; and an alteration of circumſtances may be a revocation of a will of perſonal as well as real eſtate, notwithſtanding this ſtatute, which does not extend to implied revocations [d]; as it hath been held, that, without an expreſs revocation, if a man who hath made his will afterwards marries and has a child, this is a preſumptive or implied revocation of his former will which he made in a ſtate of celibacy [e].——With reſpect to real eſtate: By lord chancellor Hardwicke: The general principle is, that, at the time of the deviſe, the deviſor muſt have a diſpoſing capacity, and an eſtate in the land deviſed; and the eſtate muſt remain in the ſame plight and condition until his death; for the leaſt alteration by any act of his makes it a different eſtate, and ſhews a different intention, and therefore is an actual revocation. Thus, if one ſeiſed in fee deviſes, then enfeoffs, or conveys it to another to the uſe of himſelf in fee, though it is the old uſe that remains, yet it is a revocation notwithſtanding it is his own feoff-

[b] Page 163.
[c] Carth. 81.
[d] 1 Eq. Caſ. Abr. 413.
[e] Gilb. on Wills, 59. Black. Com. 2 V. 502.

ment

ment or deed. So of a bargain and ſale [f] without inrolment. So if a man think himſelf tenant in fee, deviſes, and then apprehending himſelf to be only tenant in tail, ſuffers a recovery with intent to confirm his will, it is a revocation. As to mortgages, they are exceptions out of the rule: at law a mortgage for years, and in equity a mortgage in fee, are revocations *pro tanto*, that is, for ſo much only; and the reaſon is, that a mortgage is only a ſecurity, and though it be a conveyance of a real eſtate, yet in this court it is a chattel intereſt only, and goes to the executor, and it gives no dower [g].—Mortgages for terms of years on the death of the mortgagee, the term and the right in equity to receive the mortgage debt, veſt in the ſame perſon, *viz.* the executor or adminiſtrator. But, in caſes of mortgages in fee, the eſtate on the death of the mortgagee goes to the heir or deviſee, and the money is payable to his executor or adminiſtrator [h], and muſt be paid by the heir, if he has the eſtate, as hath been ſhewn [i].—If lands are deviſed to one in fee, and afterwards mortgaged to the ſame deviſee, it is a revocation *in toto*, or in the whole, being inconſiſtent with the deviſe; though if the land be mortgaged to a ſtranger, it is otherwiſe [k]; for it hath been admitted to be a ſettled rule in chancery, that where a teſtator deviſes his lands in fee to one, and after mortgages it in fee to another, and then dies before the principal and intereſt is paid, this is not a *total revocation* of the will, but *quoad* the mortgage only, or as far as the mortgage, and the deviſee ſhall have the equity of redemption [l].

IF a man deviſes lands, and then makes a feoffment or conveyance of it, and afterwards repurchaſes it, yet the will ſtands revoked by the feoffment, and the repurchaſe is no

[f] *A bargain and ſale* is a conveyance made by deed, whereby real eſtate may be conveyed as well as by deed of feoffment, or leaſe and releaſe, mentioned page 116. Yet real eſtate will not paſs by bargain and ſale, unleſs the deed be an indenture, and the ſame be inrolled within ſix months in one of the courts of Weſtminſter-hall, or with the *cuſtos rotulorum* of the county, as directed by ſtatute 27 Hen. VIII. c. 6.

[g] 5 New Abr. 527.

[h] Co. Litt. 205. Note 1. 13 Edit.

[i] Page 49.

[k] Prec. in Cha. 515.

[l] 1 Salk. 236. 258.

declaration of the teſtator's mind to ſet it on foot again [m].—Although a covenant or articles do not at law revoke a will, yet, if entered into for a valuable conſideration, amounting in equity to a conveyance, they muſt conſequently be an equitable revocation of a will or any writing in nature thereof [n].——If a man deviſes land to J. S. and afterwards bargains and ſells it to another, though this be not inrolled within ſix months, according to the ſtatute, conſequently nothing can paſs to the bargainee, yet this is a revocation of the will; becauſe here is a ſolemn act done, which plainly ſhews the intention of the teſtator to countermand the will [o].

IF a man ſeiſed in fee deviſes to A. B. in fee, or for life, and afterwards makes a leaſe to C. D. for years, this even at law ſhall not be a revocation, but during the years; for the teſtator's intent does not appear further than during the term of years [p]; and, where an huſband was poſſeſſed of a term for forty years, deviſed it to his wife, and afterwards leaſed the ſame land to another for twenty years, and died; it was held that this leaſe was no revocation of the whole eſtate, but only during the twenty years, and that the wife ſhould have the reſidue by the deviſe [q]. So, if a man ſeiſed of lands deviſes the ſame in fee, or for life, and afterwards makes a leaſe thereof to another for years, it ſhall not be a revocation but during the years: though, in caſe a perſon has deviſed lands to one and his heirs, and afterwards leaſes the ſame to him for a certain term, to commence after the deviſor's death, this is a revocation of the whole eſtate [r].

WHERE a man was ſeiſed of a leaſe for three lives, which he deviſed, and afterwards ſurrendered the old leaſe and took a new one to himſelf and his heirs for three lives, it was decreed by lord chancellor King, that this renewal of the leaſe was a revocation of the will, as to this particular [s]. So, where a teſtator deviſed by his will a leaſehold eſtate, which he held under *Magdalen College*, and after the making of his will, before his death renews his leaſe, by ſurrendering the

[m] Gilb. on Wills, 101.
[n] 2 P. Will. 624.
[o] Gilb. on Wills, 101.
[p] 1 Roll's Abr. 616.
[q] *Ibid.*
[r] *Ibid.*
[s] 3 P. Will. 166. 170.

old

old one and taking a new leaſe, it was determined by the lord chancellor that this was a revocation of the deviſe[t]. And thus it hath lately been determined with reſpect to a leaſehold eſtate ſurrendered by the teſtator after having made his will[u].

IN caſe a fortune be given to a child by the father, ſubſequent to the making of his will, wherein he had bequeathed her a portion, this ſhall be taken as a revocation of the legacy and will for ſo much[x]; as where a man by his will gave his four daughters 600l a-piece, and afterwards married his eldeſt daughter to the plaintiff, and gave her 700l portion. After that he makes a codicil, and gives 100l apiece to his unmarried daughters, and thereby *ratifies* and *confirms* his will, and dies. The plaintiff preferred his bill for the legacy of 600l given to his wife by the will. It was held by the maſter of the rolls, that the portion given by the teſtator in his life-time ſhould be intended in ſatisfaction of the legacy. And it was agreed to be the conſtant rule of the court of chancery, that where a legacy was given to a child, who afterwards, upon marriage, or otherwiſe, hath the like or greater ſum, it ſhould be intended in ſatisfaction of the legacy, unleſs the teſtator ſhould declare his intent otherwiſe; and it was ſaid the words of *ratifying* and *confirming* do not alter the caſe, though they amount to a new publication, being only words of form, and declaring nothing of the teſtator's intent in this matter[y].

THUS having ſhewn how a will, after being made, may be revoked in whole or in part, we come now to make ſome obſervation on what might be done for rectifying the revocation; and as under ſome circumſtances this might be effectuated by a codicil, and in ſome caſes by republiſhing the will, we ſhall now advert to and treat on thoſe particulars.

A CODICIL is a ſchedule or ſupplement to a will, or an addition made by the teſtator annexed to and to be taken as part of a teſtament; being for its explanation or alteration,

[t] 2 Atk. 593. 5 New Abr. 527.
[u] Caſe of Hone and Medcraft, 1783. Brown's Cha. Rep. 261.
[x] Prec. in Cha. 183.
[y] Caſe of Iſod and Hurſt, 2 Freem. Rep. 224.

or to make ſome addition to, or ſubſtractions from the former diſpoſitions of the teſtator [y]. An executor cannot regularly be appointed by a codicil, yet may be ſubſtituted, according to the will of the teſtator [z]. A man may make divers codicils, and the firſt is of equal force with the laſt, if not contradictory to each other; and herein they differ entirely in their nature from wills, for no man can die with two teſtaments, becauſe the latter doth always infringe the former, but a man may die with divers codicils, and the latter doth not hinder the former, unleſs they be contrary [a].

IN the caſe of a real eſtate a codicil, cannot operate unleſs it be executed according to the ſtatute [b]. It is neceſſary, when a codicil is added to a will with intent to paſs any real eſtate, to be careful in uſing words ſufficient, whether it be for altering former diſpoſitions, or diſpoſing of eſtates purchaſed after the will was made; and for the teſtator to execute the codicil, in the ſame manner, and with the ſame number of witneſſes, as is requiſite to the executing an original will according to the ſtatute. So, if a will concerns only perſonal eſtate, and a codicil is added with intent to make any alteration, ſubſtraction, or addition, care ought to be taken in uſing words ſufficient for the purpoſe.—— Where there is time and opportunity for writing over the will afreſh, and thereby to make ſuch alteration as may be neceſſary, it is much more adviſable, and far better, than doing it by codicil; which will not only increaſe the expence of the probate when the will comes to be proved, but perhaps require as much, if not more nicety in framing than the will itſelf.

WHERE a man may have by him two or more wills, the latter whereof, as has juſt been mentioned, overthrows the former; but the republication of a former will revokes one of a later date, and eſtabliſhes the firſt again [c]: ſo that what was before rendered void, becomes valid by the new publication; and if there are words contained therein ſufficient for paſſing or conveying ſuch eſtate as the teſtator is poſſeſſed of at the time of the republication, to the perſon or perſons for whom the ſame is deſigned, it may anſwer

y Godolphin's O. L. p. 1. c. 1. ſect. 3.
z Swinb. 14.
a *Ibid.* 15.
b 1 Atk. 426.
c Black. Com. 2 V. 502.

the

the purpoſe of making a new will; but if the words contained therein are inſufficient, it will not be effectual; for the republication makes no alteration in the words of the will, and therefore can have no effect where the words are not ſufficient to convey the eſtate to the perſon or perſons for whom it is deſigned.—Where the will concerns real eſtate, it is ſafe to republiſh it in a formal manner, as by the teſtator's taking it in his hand and declaring the ſame to be his laſt will, in the preſence of three witneſſes; and then to make a minute thereof in writing at the bottom of the will, or if there ſhould not be room ſufficient, then in the margin or on the back thereof, which may be as follows, *viz.*

WHEREAS I John Mills, *the teſtator named in this will, have republiſhed the ſame, with an intent thereby to make void all and every other will and wills at any time heretofore by me made, and to confirm and eſtabliſh this, which I have declared to be my laſt will and teſtament, in the preſence of* John Smith, Alice Smith, *and* Thomas Jones, *who I have deſired to ſubſcribe their names as witneſſes hereto: and in witneſs whereof I the ſaid* John Mills *have hereunto ſubſcribed my name this day of , in the year of our Lord* 17 .

JOHN MILLS.

Signed by the ſaid John Mills, in the preſence of us, who, at his requeſt, and in his preſence, have ſubſcribed our names as witneſſes to the above republication.

JOHN SMITH.
ALICE SMITH.
THOMAS JONES.

IF the will concerns only perſonal eſtate, it will not be amiſs to uſe the ſame formality for republiſhing it, though more ſlender evidence will be ſufficient for the purpoſe.—— As to bequeſts and teſtaments of perſonal eſtate, and a deviſe

deviſe affecting real eſtate, there is this diſtinction. The former will operate upon whatever the teſtator dies poſſeſſed of, whether he had it at the time of making his will or the ſame was afterwards acquired. The latter will operate only upon ſuch real eſtates as were the teſtator's at the time of executing and publiſhing his will; wherefore no real eſtate purchaſed afterwards will paſs under ſuch deviſe, unleſs ſubſequent to the purchaſe or contract the deviſor republiſhes his will. So here, if a man having made his will, and thereby deviſed the whole of his eſtate and effects, and afterwards purchaſes any real eſtate, and dies, without either republiſhing, or altering and re-executing his will, as directed by the ſtatute heretofore often mentioned, he may die both teſtate and inteſtate, and his perſonal eſtate may be diſpoſed of by himſelf, and his after-purchaſed real eſtate by the law, or will deſcend to his heir at law: which circumſtance now leads us to ſhew, as was propoſed, how in various caſes a man may die both teſtate and inteſtate, and thereby part of his eſtate be diſpoſed of by himſelf, and the other part by the law.

THOSE caſes will be readily perceived if we advert to what has been treated on under this and the next preceding head; as under the head of making the will, it was ſhewn that, if the teſtator by his will gives his heir at law no other eſtate than the law entitles him to, he will take by deſcent and not by the will: ſo, if there are not words in the will ſufficient for diſinheriting the heir at law, or if there is a defect in executing the will, as in ſigning, or witneſſing it, whereby the ſame may be rendered invalid as to the real eſtate; and, if it be not in writing, but only nuncupative or verbal, which may be ſufficient for the teſtator's goods and chattels. In thoſe caſes a man having real and perſonal eſtate, and having made his will and died, may be ſaid to die both teſtate and inteſtate; inteſtate as to his real eſtate, which

which will deſcend to his heir at law in ſuch manner as heretofore ſhewn [d], and teſtate as to his perſonal; for here he may have a will ſufficient with reſpect to his goods and chattels. In like manner a man may die both teſtate and inteſtate where he has a will duly ſigned and witneſſed, but has thereby diſpoſed only of part of his real and perſonal eſtate, and not mentioned the reſt, or deviſed the reſidue to any one; in which caſe part of his real eſtate will deſcend to his heir at law, and part of his perſonal be diſtributed in ſuch manner as was heretofore ſhewn [e]; unleſs it ſhould devolve to the executor under ſuch circumſtances as have been mentioned [f].

UNDER this head of revoking the will, it may be perceived that a man, after having made his will, may die either wholly inteſtate, or part teſtate and part inteſtate; as where he revokes his will; which revocation may ariſe from a variety of cauſes, and be either expreſſed or implied; as if the teſtator cancels his will by tearing, obliterating, or burning it, which is an expreſs revocation; ſo where, after having made his will, he marries and has a child; this is held a preſumptive or implied revocation; and hereby, as well as by tearing, obliterating, or burning his will, he may die wholly inteſtate, both as to his real and perſonal eſtate. Likewiſe implied revocations are, where the eſtate deviſed is altered after making the will; as in caſe the teſtator afterwards conveys the ſame to another, even though it may be reconveyed to him, yet the conveying it is an implied revocation of his will, as to the eſtate conveyed by him. So if a man be poſſeſſed of a leaſehold eſtate, and after having deviſed it ſurrenders his leaſe, and takes a new leaſe of the eſtate, this is an implied revocation of his will as to this particular, and if he dies before republiſhing it, he may die both teſtate and inteſtate; teſtate as to that part of his will which is unrevoked,

[d] Page 86—92.
[e] Page 66.
[f] Page 155.

and

and inteſtate as to the part revoked; ſo that one part of his eſtate may be diſpoſed of by himſelf, and the other left to the diſpoſition of the law. So it may be in reſpect to other caſes that amount to implied revocations.

THERE is another kind of inteſtacy, which may be where a man may have made his will in writing purſuant to what is required by the ſtatute of 29 Car. II. and thereby deviſed his real and perſonal eſtate, but hath not appointed any executor either expreſsly, or by words whereby the making of an executor may be implied; and in this caſe a man may alſo be ſaid to die both teſtate and inteſtate; teſtate as to his real eſtate, and inteſtate as to his perſonal: yet here the law has no concern with the diſpoſal of either, adminiſtration being to be granted with the will annexed, which is to be the adminiſtrator's guide in diſpoſing of the perſonal eſtate, in like manner as heretofore mentioned[g]; and as to the real eſtate, an executor, as ſuch, if appointed, has no concern therewith; neither is the appointment of an executor requiſite where the will concerns only real eſtate, and has no concern with goods or chattels, nor ought it in ſuch caſe to be proved in the ſpiritual court[h].

[g] Page 2.

[h] Cro. Car. 396.

CHAP.

CHAP. IV.

Of proving the Will.

UNDER this head I ſhall firſt conſider what an executor may do before the will is proved, and the reaſon why it ſhould be proved: likewiſe whether it is prudent for the executor to take upon him the executorſhip, or to refuſe it: then juſt take notice of the will, which concerns both real and perſonal eſtate, or perſonal eſtate only; and where and by whom the probate thereof is to be granted; and proceed to ſhew how the will may be proved in common form, or form of law, and the end and purpoſe of proving it either way. For proving it in common form, the power an executor has for compelling the ordinary to grant the probate; the form of the executor's oath previous to obtaining it; and the expence thereof.——Caſes wherein adminiſtration muſt be granted with the will annexed, and the manner of thus granting it.——The method of proving a will in chancery.——That a will muſt be regiſtered for paſſing real eſtate, and certain chattels real in the counties of York and Middleſex; and the manner and form of doing it.——In what courts ſuits muſt be brought for proctors fees, and the manner of taxing their bills.

BEFORE letters of adminiſtration are iſſued, an adminiſtrator can do nothing, yet an executor may do many acts before he proves the will, as heretofore mentioned[a]: and the reaſon of this is, that an executor derives his power from the will and not from the probate; but the adminiſtrator owes his entirely to the appointment of the ordinary. An executor, before the will be proved, may ſeize and take into his hands any of the goods of the teſtator. He may

[a] Page 2.

pay

pay debts, receive debts, make acquittances and releaſes of debts due to the teſtator, and take releaſes and acquittances of debts owing by the teſtator; and if before the will be proved the day occur for payment upon bond made by or to the teſtator, payment muſt be made to or by the executor, though no will be proved, upon the like pain of forfeiture as if the will were proved. Alſo, an executor may before probate, ſell or give away any of the goods or chattels of the teſtator[b]. And the executor, for goods of the teſtator taken from him, or a treſpaſs done upon the leaſe land, or a diſtraining or impounding of goods or cattle, may maintain, before the will be proved, actions of diſtreſs, or replevin, or detinue; for theſe actions ariſe upon the executor's own poſſeſſion. But before the proving of a will, an executor cannot maintain a ſuit or action of debt, or the like; and the reaſon is, for that therein he muſt ſhew forth the will, proved under the ſeal of the ordinary. And ſo it ſeems it muſt be, if he bring any action for treſpaſs done, or goods taken in the teſtator's lifetime, ſo as the teſtator himſelf was intitled to the action, and it grows not upon the executor's poſſeſſion. But upon the executor's own contract for the teſtator's goods; as if the executor ſell cattle or other goods of the teſtator's before the will be proved, he may for the money payable maintain an action for debt before he hath proved any will; and in this, and the action of treſpaſs, there is no neceſſity of naming him executor[c]. In general, an executor is a complete executor before probate to all purpoſes but bringing of actions; ſo that he may releaſe an action, aſſent to a legacy, may be ſued, may aliene, or otherwiſe intermeddle with the goods of the teſtator[d]. For by adminiſtering (that is, if one do either pay debts of the teſtator, or receive debts, or make acquittances for them, or demands the teſtator's debts as executor, which are acts of adminiſtering[e], as will be more fully ſhewn hereafter[f]), the executor hath ac-

[b] Went. Off. Exec. 34, 35.
[c] *Ibid.* 36.
[d] 1 Salk. 301.
[e] Went. 41.
[f] Page 182.

cepted and taken upon him the whole adminiſtration before the probate; and is thereby entitled to receive the debts due to the teſtator; and all payments made to him are good, and ſhall not be defeated, although he ſhould die and never prove the will [g].

THE executor may, in convenient time after the teſtator's death, enter into the houſe deſcended to the heir, for the removing and taking away the goods, ſo as the door be open, or at leaſt the key be in the door; and this ſeems to be underſtood of the door of each room. For, although the door of entrance into the hall and parlour be open, the executor cannot by that juſtify the breaking open the door of any chamber to take the goods there; but only may take thoſe in the rooms which be open. And this ſeems to be proved by the caſe of a cheſt with evidences; which it is ſaid the executor may take, and put out the deeds, delivering them to the heir, that is to ſay, the cheſt being unlocked; though a chamber or other room within the houſe locked, is an incloſure of better reſpect than a cheſt. —— If the goods be not removed within a convenient time, the heir may diſtrain them as damage feaſant [h], that is, doing damage, or treſpaſſing upon his land [i]. In a caſe of treſpaſs upon demurrer, which was, leſſee for life of a houſe and paſture land dies, his executors ſuffer his cattle to go there for ſix days after his death, and then removed them; and in treſpaſs juſtify for that time, averring, that in the time of ſix days they could not procure any other land or place to put in the cattle; whereupon it was demurred. And whether that were a convenient time to remove them, was the queſtion. And the court ſeemed to incline, that ſix days is but a convenient time for the removing of their cattle; and the law allows a convenient time for their removing; eſpecially it being averred they had not any other place to remove them unto. But for a fault in the plea wherein the defendant pleaded a leaſe of the houſe, but not of the land,

[g] 1 Salk. 306, 307.
[h] Went. Off. Exec. 92.
[i] Black. Com. 3 V. 6.

as

as was mentioned in the declaration, it was adjudged for the plaintiff[k].

As the executor may receive debts, releaſe debts, and do other acts before the will be proved; ſo on the other hand an executor may be ſued for debts of the teſtator before the will be proved; unleſs he refuſed the executorſhip in due manner, ſo as adminiſtration may be granted, and there may be ſomebody ſuable for the teſtator's debts[l].

By ſtatute 21 Hen. VIII. c. 5. the ordinary or other perſon having authority for probate of teſtaments, may convent before them perſons named executors of any teſtament, to the intent to prove or refuſe the ſame. And if the executors do not appear upon the proceſs, the ordinary may excommunicate them: but they may pray time to adviſe, and the ordinary may grant in the mean time letters *ad colligendum bona defuncti*; that is, to gather up the goods of the deceaſed[m].—Where a will is made and executors named, the ordinary, if he knows thereof, before he commits adminiſtration, muſt ſend out proceſs againſt the executors to come in and prove it; and if they do not come, they are to be excommunicate; but if they do come, and if they, nor any of them, will prove; then, by reaſon of ſuch refuſal, the ordinary may commit adminiſtration with the will annexed[n]. Refuſal muſt be by ſome act entered or recorded in the ſpiritual court, and not verbally or by word, and therefore muſt be done before ſome judge ſpiritual, and not before neighbours in the country; for that is not effectual[o].—After refuſal, and adminiſtration committed, the executor cannot go back to prove the will and aſſume the executorſhip; but if only upon the executor's making default to come in upon the proceſs to prove the will, the adminiſtration be committed, here the exe-

k Cro. Jac. 204.

l Went. Off. Exec. 36.

m Treatiſe of Eq. 109.

n How this adminiſtration is committed, ſee page 194.

o Went. Off. Exec. 37. Swinb. 443.

cutor

cutor may at any time after come and prove the will, and ſo undo the adminiſtration [p].—If a man make an executor, but this is not known, or is concealed, the ordinary may grant adminiſtration until the will be proved [q]. And if the perſon be diſabled to be executor, or no executor at all be named in the will, the ordinary may grant adminiſtration [r]. If adminiſtration be granted where there is a will and executors, although the will be concealed, the adminiſtration ſhall be void, if the will be produced and proved, as hath heretofore been ſhewn [s].

IF there be but one executor, and he do refuſe, or being many, and they do all refuſe, then is the party dead inteſtate, and adminiſtration is to be committed with the will annexed, as has juſt been mentioned, and none after can meddle as executors [t]. But where there are divers executors named in the will, and ſome of them do refuſe, and others of them prove the teſtament; they who refuſe may after, at their pleaſure, adminiſter notwithſtanding ſuch refuſal before the ordinary [u]; as in caſe there be A, B, and C, and A only refuſeth, and the will is proved by the others, there A continueth executor, notwithſtanding his refuſal; for the will being proved, all the executors therein named ſtand and continue executors, notwithſtanding any of their refuſal [w]; and at any time during the lives of their companions, they may prove the will, they may pay debts, make releaſes, and they muſt be joined in all ſuits where the co-executors are plaintiffs; becauſe they are all privy to the will; but not where they are defendants; becauſe the plaintiff in the action is not bound by the law to take notice of any but thoſe who have proved the will [x]. When the teſtament is proved by any of the executors, the refuſal of the others before the ordinary is void.

As to bringing of actions in the king's courts, the judges do not admit the executors to ſue for things in action, if they

[p] Went. Off. Exec. 39.
[q] 1 Roll's Abr. 907.
[r] Swinb. 380.
[s] Page 18. 47.
[t] Went. Off. Exec. 41. 9 Co. Rep. 37. 3 P. Will. 251.
[u] Bacon's Uſe of the Law, 261.
[w] Went. Off. Exec. 42.
[x] Swinb. 444.

ſhew not the teſtament duly proved under the ſeal of the ordinary; but always the king's courts have uſed to allow the probate of any of the executors to enable them all to bring actions; ſo that the probate of the teſtament doth not give them any intereſt or title to the things in action or poſſeſſion, for they have their title and intereſt by the teſtament, and not by the probate; and yet without probate the judges will not allow them to bring actions [y] as executors.——Where there be two executors, and one of them proveth the will in the name of them both, againſt the will of the other; this is not any adminiſtration for him who conſented not to the probate; but he may plead that he never was executor; for the probate maketh him not executor, if he doth not adminiſter [z].

IF there be two executors made, and one of them refuſes before the ordinary, and the other proves the will, and makes a will himſelf, and appoints an executor, and then die; in this caſe, it ſeems the executor of the executor who proved the will alone, ſhall have the diſpoſition of all the eſtate, and be executor to the firſt teſtator; and the ſurviving executor ſhall not intermeddle therewith; for his election by the death of his companion is gone [a].

IF an executor die after he hath proved the will, and hath by his will appointed an executor, in caſe there was but one executor, this executor alſo ſhall be executor to the firſt teſtator, as he is to the ſecond; and he ſhall have all the benefit, and be ſubject to all the charge, that the firſt teſtator had and was ſubject unto; and yet the goods of one teſtator ſhall not be ſubject to the debts of the other, but each of the teſtator's goods ſhall be ſubject to the payment of his own debts only. And if in this caſe, the executor of the executor take upon him the adminiſtration of the goods of the firſt teſtator, he cannot refuſe the adminiſtration of the goods of the latter; yet he may take upon him the latter,

[y] 9 Co. Rep. 38.
[z] 1 Roll's Abr. 918.
[a] Dyer, 160, Shep. Touch. 445. 4 edit.

and

and refuſe the former. But if the executor refuſe to adminiſter to the firſt teſtator before the ordinary, or die before probate of the will, and he hath made a teſtament, and appointed an executor therein; in this caſe, it ſeems the executor of the executor ſhall not adminiſter the goods of the firſt teſtator, but the ordinary muſt grant adminiſtration thereof; unleſs the *reſiduum* of the goods, after the debts paid, were given by the will to the firſt executor [b].

IN all caſes, except of ſpecial truſt or authority, without the office of executorſhip, the executor of an executor ſtands, as to the points both of being, having, and doing, in the ſame ſtate and plight as the firſt and immediate executor [c]. But if two be appointed executors, and the one makes his teſtament, wherein he names his executor, and dies, his co-executor ſurviving; in this caſe, the executor of the executor is not to be joined with the executor ſurviving, neither in the execution of the will, nor in ſuits or actions. And if the executor of the executor have any goods or chattels in his hands which did belong to the firſt teſtator, the executor of the ſame teſtator ſurviving may have an action againſt the executor of the executor for the ſame; for the power of the executor who died firſt was determined by his death, the other then ſurviving [d]: ſuppoſing, in this caſe, the ſurviving executor did not refuſe in the life of his companion, in manner before mentioned. So, where there are two adminiſtrators, and one dies, the adminiſtration ſurvives, as heretofore ſhewn [e].——Where two executors are made, the one making a will and executors, and dying, if the other die after inteſtate; the executor of him who firſt died, ſhall not be executor to the firſt teſtator, as he is dead inteſtate; becauſe the ſurviving executor is ſo dead, and in him the executorſhip was wholly and ſolely ſettled by the death of his fellow before him; and in this caſe adminiſtration of

[b] Shep. Touch. 445. 4 edit.
[c] Went. Off. Exec. 259.
[d] Swinb. 324, 325.
[e] Page 6. 21.

goods not adminiſtered, or adminiſtration *de bonis non adminiſtratis*, as it is uſually termed, ſhall be committed [f].

THE intereſt veſted in the executor may be continued and kept alive by the will of the ſame executor; ſo that the executor of A's executor, is to all intents and purpoſes the executor and repreſentative of A himſelf; but the executor of A's adminiſtrator, or the adminiſtrator of A's executor, is not the repreſentative of A. For the power of an executor is founded upon the ſpecial confidence and actual appointment of the deceaſed; and ſuch executor is therefore allowed to tranſmit that power to another, in whom he has equal confidence: but the adminiſtrator of A is merely the officer of the ordinary, preſcribed to him by act of parliament, in whom the deceaſed has repoſed no truſt at all; and therefore, on the death of that officer, it reſults back to the ordinary to appoint another, or to commit a new adminiſtration, as hath heretofore been mentioned [g]. So that in theſe caſes, and whenever the courſe of repreſentation from executor to executor is interrupted by any one adminiſtration, it is neceſſary for the ordinary to commit adminiſtration afreſh, of the goods of the deceaſed not adminiſtered by the former executor or adminiſtrator [h].

THE probate of the will (as having reſpect to goods and chattels) is in ſome reſpect neceſſary; but touching any freehold of lands deviſed, it is not at all material. As to goods and chattels, although the executor before probate, may receive and releaſe debts, he cannot ſue for any debts due to the teſtator [i], neither can an executor or other perſon give a will in evidence concerning a perſonal chattel without producing the probate; for this will is no will, until it has received a ſanction or an allowance of it in the ſpiritual court; for they are to judge whether it be a will or not;

[f] Went. Off. Exec. 101.
[g] Page 6.
[h] Black. Com. 2 V. 506.
[i] Co. Litt. 292.

and the temporal courts are not to look upon it as a will till probate be made. And in an action of trover for goods which a teſtator gave to his ſiſter in his life-time, brought againſt the executor for them, who would have given in evidence a former will to have ſhewn that he had no power to give thoſe goods; this was refuſed, becauſe he ought to have produced the probate[k].

HENCE we may form an idea of what an executor may do before the will is proved, and hereby, and by what will hereafter be ſhewn with reſpect to proving in common form, or form of law, the reaſons why it ſhould be proved may be perceived[l]. And now we may conſider whether it is prudent for the executor to take upon him the executorſhip, or to refuſe it; and here we may firſt examine by what means he may make himſelf liable thereunto, and how far he may meddle with the teſtator's eſtate without ſubjecting himſelf thereto: and then what profit or advantage may accrue to him, and what detriment or loſs he may ſuſtain thereby.

HE that is named executor cannot be compelled to ſtand to the will and undertake the executorſhip, unleſs he hath already meddled with the goods of the teſtator *as executor*; and whereby he is not only to be compelled to perform the office of an executor, but alſo if he ſhould refuſe, and the ordinary commit adminiſtration unto him, this refuſal is void, and he ſhall be charged as executor[m]. So that if the executor named in the teſtament reſolve not to ſtand to the executorſhip, but to refuſe the ſame, he ſhould not adminiſter the goods of the deceaſed as executor; for having once adminiſtered *as executor*, he may at any time after be compelled to undergo the burden of an executor, and alſo may

k Viner's Abr. Executor, A. a. 20.

l See page 188, 189.

m Swinb. 384.

be ſued as executor by the creditors of the teſtator, though he cannot ſue others as executor; for that he hath not the will under the ordinary's ſeal.

A PERSON is then ſaid to adminiſter as executor, ſo as thereby he may be compelled to ſtand to the executorſhip, when he performs thoſe acts which are proper to an executor; as to pay the debts due by the teſtator, or to receive any debts due unto the teſtator, or to give acquittances for the ſame [n], or demand the teſtator's debts as executor: all theſe be full and clear adminiſtrations as executor. And if one being ſued as executor, take it upon him and plead in bar as executor, this is an adminiſtration. The common plea to free himſelf, and to ſhew that he is not the party ſuable for the teſtator's debt, being, that he neither is executor, nor ever did adminiſter as executor [o]. If a man do thoſe acts which are not proper to an executor, he is not ſaid to have adminiſtered as executor, to the effect before mentioned; as to feed the cattle of the deceaſed, leſt they ſhould periſh, or to take into his cuſtody the goods of the deceaſed, to the end they may be ſafe from being ſtolen or purloined, or to diſpoſe of the teſtator's goods about the funeral; for theſe be deeds of charity common to every chriſtian, and not peculiar to an executor. Likewiſe to make an inventory of the goods of the deceaſed, is not to adminiſter as an executor, or to deliver to the wife her convenient apparel [p].

As to the profit or advantage that may accrue to an executor by taking upon him the executorſhip, we may obſerve that, although a perſon hath not meddled with the goods of the teſtator, and is therefore not compellable, yet, if a legacy be left to him, he may be compelled to ſtand to the executorſhip, or elſe loſe his legacy [q]. But, where a creditor conſtitutes his debtor his executor, it is a releaſe or diſcharge of the debt, whether the executor acts or no; provided there be aſſets ſufficient to pay the teſtator's debts, as has been mentioned [r].

[n] Swinb. 469.
[o] Went. Off. Exec. 41.
[p] Swinb. 471, 472.
[q] Gibſon, 469.
[r] Page 155.

FORMERLY

FORMERLY it was a ſettled notion, if there was no reſiduary legatee appointed by the will, the ſurplus or *reſiduum* devolved to the executor's own uſe, by virtue of the executorſhip; but now there is this reſtriction, that although where the executor has no legacy at all, the *reſiduum* ſhall in general be his own; yet, where there is a ſufficiency on the face of the will (by means of a competent legacy, or otherwiſe) to imply that the teſtator intended his executor ſhould not have the reſidue, the undeviſed ſurplus of the eſtate ſhall go to the next of kin; and if there be no kindred, then to the crown[s].

IN caſes where unequal legacies have been given to executors, and the ſurplus or *reſiduum* of the teſtator's eſtate undiſpoſed of, the ſame hath been adjudged to devolve to the executors, by virtue of their executorſhip, upon the principle juſt mentioned; as that there hath not appeared a ſufficiency on the face of the will to imply that the teſtator's intention was otherwiſe; and upon this principle the court of chancery determined in favour of the executors, in the caſe of *Bowker* and *Hunter* lately before the court, and which was as follows: *Frances Bayley* being poſſeſſed of a conſiderable perſonal eſtate, 31ſt January 1777, made her will, and thereby gave to *Thomas Vickars Hunter*, gent. the ſum of 200l. and, after a great many legacies to a variety of perſons, among whom were *ſome* of her next of kin; ſhe gave the Rev. *James Eaton* the ſum of 50l. and after ſome charitable legacies, ſhe appointed the ſaid *Thomas Vickars Hunter* and *James Eaton*, executors; but made no diſpoſition of the reſidue. The executors having proved the will, the next of kin filed a bill in the court of chancery, for an account of the reſidue of the teſtatrix's eſtate, and praying that the executors having legacies, it might be diſtributed. The defendants (the executors) admitted aſſets more than ſufficient to pay debts, legacies, and funeral expences; but inſiſted they had a right to the perſonal eſtate, there being nothing incon-

[s] Mentioned in page 155, 156.

ſiſtent with ſuch right in the will, or indicative of a contrary intention; the legacies not being given to them as executors, but by their proper names, and there being a great inequality between them, by which the teſtatrix ſhewed ſhe meant to diſpoſe of the whole, and not to die inteſtate, as to any part thereof. ——This cauſe being argued, and a variety of caſes cited by the counſel on each ſide. By the lord chancellor in his diſcuſſion thereof. Here the teſtator's intention is declared in more ſlender words than in any of the other caſes. When the teſtator gives the executor part by expreſs words, and in the ſame manner as he appoints him executor, it ſhews his intention to be different from that expreſſed by the fact of making him executor.——In order to make a gift of part a bar to taking the reſidue, the general gift muſt make the intent as clear as the other intention is from making him executor; where it will bear another intent, it will not bar him from taking the reſidue. The fundamental diſtinction is eſtabliſhed by laying it down that the rule, *that the executor ſhall take the reſidue*, muſt prevail, unleſs there is an irreſiſtible inference to the contrary. If the gift of the legacy is qualified, it is ſufficient to prevent its barring the reſidue, or if it may be given for a different purpoſe. The gift of unequal legacies may have a different ground from the gift of the whole; it may in many events be different: for inſtance, if 100l. be given to one, and 50l. to the other, it may be different, in caſe of deficiency, from giving the one 50l. the other nothing. The implication is, that the teſtatrix muſt have had a different intent, and that muſt rebut the equity; and therefore the bill muſt be diſmiſſed[t]; whereby the executors have the reſidue.

UPON a re-hearing of this cauſe, before the lords commiſſioners, before whom it was argued very fully, lord Loughborough cited all the caſes pertinent to the point, and delivered the opinion of the court, as follows, *viz.* The caſes, ſuch as they are, are in favour of the executors. I think the ſafer proceeding will be, to affirm lord Thurlow's decree,

[t] Caſe of Bowker and Hunter, 1783. Brown's Cha. Rep. 328.

which

which will throw this caſe into the line of thoſe determinations which have proceeded on the diſtinction; without overthrowing thoſe where a legacy is given ſimply to an executor [u].

WHERE a church becomes void, ſoon after the teſtator's death, as if A, patron of the church of D, grant to B the next avoidance, the church becomes void, A dies before he preſents, his executor preſents, and hath the benefit of preferring his ſon or friend; and this ſhall not make aſſets in his hands for payment of debts, for that he could not lawfully take money to preſent [x].——By what has been mentioned under the ſecond ſection of the ſecond chapter of the law's diſpoſal, the power an executor has by virtue of his executorſhip may be perceived; and in the enſuing ſection the particulars of what he is intereſted in [y]. And, under a ſubſequent head, we ſhall treat on the time an executor has for paying legacies, and the intereſt that may be payable for the ſame [z].

ONE executor ſhall not be charged with the wrong or devaſtavit of his companion, and ſhall be no farther liable than for the aſſets that came to his hands; and therefore where an action was brought againſt two executors, and the jury found that the two and another were made executors, and that the third waſted the aſſets, to the amount of 6000l. and died, and that only 16l. came to the hands of the two others; the court held that they ſhould be charged for no more than the 16l. for that it was the teſtator's folly to truſt ſuch a perſon, which muſt not turn to the prejudice of the other executors [a].——Where an executor or adminiſtrator puts out money upon a real ſecurity, which at that time there was no reaſon to object to, and afterwards ſuch ſecurity proves bad, he ſhall not be accountable for the loſs [b].——The executor ſhall be allowed all reaſonable expences, as well in law ſuits, as for other honeſt pur-

u Brown's Cha. Rep. 334.
x Went. Off. Exec. 73.
y Page 21. 28.
z Page 205. 210.
a Bac. Ab. 395.
b 1 P. Will. 141.

poſes;

poſes; and this reaſonableneſs of expences to be ſuch, as that he may receive thereby neither profit nor loſs, as heretofore mentioned [x].

THE danger of an executor's ſuſtaining detriment or loſs by taking upon him the executorſhip, will chiefly ariſe from the inſufficiency of the teſtator's goods and chattels for ſatisfying debts and legacies; eſpecially if he is not careful in obſerving the rules and order for paying the ſame.

WHEN the teſtator's goods and chattels are not ſufficient to pay his debts and legacies, there are divers ways whereby an executor may endanger his own eſtate and ſubject the ſame to anſwer damages; as 1. When he beſtows more upon the funeral of the deceaſed than is meet, and for which a very ſmall ſum ſeems to be allowed againſt creditors, as we have heretofore ſeen [y]: 2. When he pays legacies in money, or aſſents to legacies before the debts are paid, and hath not enough beſides to pay the debts: 3. When he doth not pay the debts in that order and manner as hereinbefore ſhewn [z], but pays them firſt that he ſhould pay laſt, and he hath not enough to pay them all: 4. When he doth releaſe a debt or duty due to the deceaſed before he receives it; or, when the goods of the deceaſed being taken from him, he releaſes to him that takes them the action whereby he might have recovered them; 5. When he ſells the goods of the deceaſed much under value, eſpecially if it be with covin; as, to his near friends, to his own uſe, to have money under-hand, or the like; but otherwiſe to ſell them under value, eſpecially when he cannot conveniently make more of them, is no waſte. All thoſe, and ſuch like acts as theſe, are ſaid to be a waſte in an executor or adminiſtrator; and being diſcovered againſt him by return of the ſheriff, it will produce this effect, to make the executor or adminiſtrator chargeable for ſo much as he hath miſemployed and waſted *de bonis propriis*, i. e. of his own pro-

[x] Page 62.
[y] Page 51, 52.
[z] Page 51—60.

per goods: ſo that any creditor may charge him for the debt due to him from the teſtator, as for his own proper debt, and for ſo much the execution ſhall be made againſt him upon his own body, lands, and goods: and yet ſo as one executor or adminiſtrator ſhall not be charged for the waſte of another; for if there be many executors, and one of them only doth commit the waſte, he only ſhall be puniſhed for the waſte [a]. But where two executors join in an acquittance, but only one receives the money, both are chargeable for it as to creditors, who are to have the utmoſt benefit of the law; but the actual receiver, it is ſaid, is only chargeable as to legatees or perſons claiming under diſtribution [b].

THIS being premiſed, the executor may conſider the teſtator's circumſtances, and whether it is prudent to take upon him the executorſhip, or to refuſe: and now we may juſt take notice of the will which concerns both real and perſonal eſtate, or perſonal eſtate only, and of where, and by whom, the probate thereof is to be granted; and proceed to ſhew how the will may be proved in common form, or form of law; and the end and purpoſe of proving it either way. For proving in common form, the power an executor has for compelling the ordinary to grant the probate; the form of the executor's oath previous to obtaining it; and the expence thereof.

THE will which concerns both real and perſonal eſtate ought to be proved in the ſpiritual court, as in caſe it concerned perſonal eſtate alone [c]; but when it concerns only real eſtate, it ought not to be proved in the ſpiritual court, as before mentioned [d]. Where and before whom the probate of the will is to be granted, having been ſhewn [e], we need ſay no more here concerning it.

THE manner and form of proving teſtaments is of two ſorts; the one is called the vulgar or common form; the other

a Shep. Touch. 4 edit. 463, 464.
b 1 Salk. 318.
c Cro. Car. 396.
d Page 172.
e Page 6—13.

is

is termed the ſolemn form, or form of law[f]. If letters teſtamentary are granted to the party who exhibits the will merely on his oath, by ſwearing that he believeth it to be the laſt will of the deceaſed; this is called proving it in common form[g]: and where there is no controverſy or diſpute touching the will, there the ſingle oath of the executor alone is ſufficient for this purpoſe[h]. Where the teſtament is to be proved in form of law, it is requiſite that ſuch perſons as have intereſt, as the widow and next of kin to the deceaſed, to whom the adminiſtration of his goods ought to be committed if he had died inteſtate, are to be cited to be preſent at the probation and approbation of the teſtament; in whoſe preſence it is to be exhibited to the judge, and petition to be made by the party who prefers the will, and enacted for the receiving, ſwearing, and examining the witneſſes upon the ſame, and for the publiſhing or confirming thereof; whereupon witneſſes are received and ſworn accordingly, and are examined every one of them ſecretly and ſeverally, not only upon the allegation or articles made by the party producing them, but alſo upon interrogations miniſtered by the adverſe party, and their depoſitions committed to writing: afterwards the ſame are publiſhed; and in caſe the proof be ſufficient, the judge, by his ſentence or decree, pronounces for the validity of the teſtament[i].

THE difference of form in proving the will, works this diverſity of effect, viz. that the executor of the will proved in the abſence of them which have intereſt, may be compelled to prove the ſame again in due form of law; and if the witneſſes be dead in the mean time, it may endanger the whole teſtament; eſpecially if 10 years be not paſſed ſince the probation, whereby neceſſary ſolemnities are preſumed to have been obſerved: whereas the teſtament being proved in form of law, the executor is not to be compelled to prove the ſame any more; and although all

[f] Swinb. 448.
[g] 2 Nelſ. Abr. 1301.
[h] Godolph. 65.
[i] Swinb. 448, 449.

the

the witneſſes afterwards be dead, the teſtament doth ſtill retain its full force[k]: but is probable that this word *ten* in figures may have been miſtaken for *thirty*; for Dr. Godolphin ſays, the will being proved only in common form, it may be queſtioned at any time within thirty years next after, by common opinion, before it work preſcription[l].

THIS proving of the will in ſolemn form, is commonly at the inſtance of ſome perſon who deſireth to invalidate the ſame; in which caſe, his proctor, at the time of exhibiting the will, ought to accept the contents thereof ſo far forth as it maketh for the benefit of his client; otherwiſe, if any legacy is given to him in the will, he ſhall loſe it for his general impugning the will[m]. If the parties intereſted do not call the executor to prove the will in ſolemn form, the executor himſelf may cauſe it to be thus proved; and where an executor hath the greateſt part of the goods of the deceaſed bequeathed unto himſelf, and is in doubt whether, after the witneſſes be dead, that the wife or children, or other kindred of the deceaſed, will conteſt the validity of the will, he may cite them in ſpecial, and all others pretending intereſt in general (as is the uſual practice), to ſee the will proved by the witneſſes; which being done, the will ſhall not be ſet aſide afterwards (provided there hath been no irregularity in the proceſs), when the witneſſes are dead[n].

WHEN the will is proved either in common form, or in form of law, the original muſt be depoſited in the regiſtry of the ordinary, and a copy thereof in parchment is made out under the ſeal of the ordinary, and delivered to the executor, together with a certificate of its having been proved before him; all which together is ſtiled the probate[o].

FOR proving the will in common form, it has juſt been mentioned[p], that the ſingle oath of the executor alone is ſufficient for this purpoſe; and if no ſuit is depending in the

k Swinb. 449.
l Godolph. 62.
m 1 Ought. 21.
n 1 Ought. 21.
o Black. Com 2 V. 508.
p Page 188.

temporal

temporal courts concerning the will, an executor, in caſe of being refuſed, may have a writ of mandamus to compel the ordinary to grant probate thereof: but if the validity of the will is conteſted in the eccleſiaſtical court, it is a ſufficient anſwer by the ordinary to a writ of mandamus, to return, that a ſuit is depending before him, and not yet determined[q]. A teſtator having thought the executor appointed a proper perſon to be entruſted with his affairs, the ordinary cannot adjudge him diſabled or incapable, neither can he inſiſt upon ſecurity from the executor, as the teſtator hath thought him able and qualified[r]: Yet if an executor becomes *non compos*, or as it is uſually termed, *non compos mentis*, which is, where a perſon is not of ſound mind, memory, and underſtanding; then the ſpiritual court may commit adminiſtration[s]. If the executor becomes bankrupt, it is ſaid the ordinary cannot grant adminiſtration to another[t]: yet the court of chancery, where an executor is conſidered as a truſtee, if he become inſolvent, will oblige him to give ſecurity before he enters upon the truſt[u]: ſo in ſome caſes, after he has taken upon him the executorſhip, he may be compelled to give ſecurity for paying a legacy, as we ſhall ſee under a ſubſequent head[w].

THE executor's oath, previous to obtaining the probate, is uſually in this form: "You ſhall ſwear, that you believe "this to be the true laſt will and teſtament of A B deceaſed: "that you will pay all the debts and legacies of the de- "ceaſed, as far as the goods ſhall extend, and the law ſhall "bind you; and that you will exhibit a true, full, and "perfect inventory of all and every the goods, rights, and "credits of the deceaſed, together with a juſt and true ac- "count, into the regiſtry of the ——— court of ———, "when you ſhall be lawfully called thereunto[x]." You alſo ſwear, that you believe the whole of the goods, chattels, and credits, of or belonging to the ſaid A B, at the time of his death, did not in value exceed the ſum of l. So "help you God."

q Burr. Manſf. 2295.
r 1 Salk. 299.
s 2 New Abr. 376.
t 1 Salk. 299.
u 2 New Abr. 377.
w Page 213.
x 4 Burn's Eccleſ. Law, 202.

BEFORE

BEFORE an executor applies for proving the will, it is adviſable for him to make an inventory, and that whether the ſame is required to be turned in to the ordinary or not; for unleſs an inventory or a calculation of the value of the deceaſed's goods, chattels, and credits, be made, the executor cannot be prepared to take the oath required, which has been mentioned with reſpect to an adminiſtrator's oath; and likewiſe ſome other reaſons why the inventory ſhould be made, and the manner and form of making it ſhewn[y]. And what is to be paid as for the fees and expence of proving the will, has been treated on[z]: but in theſe fees an increaſe has appeared ſince the ſtatute 23 Geo. III. yet how far it will be allowed in an executor's or adminiſtrator's account, by the temporal courts, cannot be determined, no caſe having come before either of the courts, relative thereto ſince the ſtatute took effect, as I conceive; wherefore ſhall omit ſaying any more concerning it, otherwiſe than by obſerving it to be a matter of much leſs moment than the expence of a ſuit or conteſt in the eccleſiaſtical court, the coſts whereof being ſometimes very conſiderable; I ſhall hereafter, as was propoſed, ſhew in what courts ſuits muſt be brought for proctors fees, and the manner of taxing their bills; and at preſent proceed briefly to point out what the fees and expence of proving wills an taking of adminiſtrations now amount to, purſuant to what I have lately learned by a minute enquiry from ſome of the moſt eminent practitioners in Doctors Commons; and thereby the reader may perceive what he is to pay for proving the will in common form, and for letters of adminiſtration, provided there is no oppoſition, as heretofore mentioned[a]; and that the will have the names of two witneſſes ſubſcribed thereto[b], and it be very ſhort, as not exceeding three or four ſheets, each whereof containing juſt ninety words. If the will contain more than three or four of thoſe ſheets, the expence will be increaſed about two ſhillings for every ſuch ſheet.

y Pag. 37—42. See more concerning making an inventory, page 210.

z Pag. 16, 17.

a Page 16.

b See the reaſon of two witneſſes, page 154.

THE

THE fees and expences alluded to may be perceived by the following table:

Where the Value of the Goods, Chattels, and Credits, of a common Seaman, or Soldier, slain or dead in the King's Service, is	In common Form.						By Commission.					
	Probates.			Administrations.			Probates.			Administrations.		
	L.	S.	D.	L.	S.	D.	L.	S.	D.	L.	S.	D.
L. Under 5,	0	7	0	0	7	0	0	14	0	0	14	0
5, and under 20,	0	7	0	0	15	0	0	19	0	1	5	0
20, and under 40,	1	0	6	1	8	6	1	16	0	2	1	0
40, and under 60,	1	4	0	1	10	0	2	0	0	2	5	0
With respect to all other Persons where the Value of the Goods, &c. is L.												
L. Under 5,	0	8	6	0	9	6	0	17	0	0	18	0
5, and under 6,	0	15	6	1	2	6	1	13	0	1	19	8
6, and under 20,	1	2	0	1	9	6	2	1	0	2	8	0
20, and under 40,				2	4	0				3	6	8
40, and under 100,	2	2	0	2	13	6	3	12	10	3	18	6
100, and under 300,	4	12	6	5	6	10	6	6	2	6	11	10
300, and under 600,	6	19	2	7	13	6	8	12	10	8	18	6
600, and under 1000,	8	2	6	8	16	10	9	16	2	10	1	10
1000, or upwards,	9	5	10	10	0	2	10	19	6	11	5	2

HAVING finished our last propositions, we come now to consider in what cases administration must be granted, with the will annexed; or, as it is commonly termed, administration *cum testamento annexo*, and the manner of thus granting it.

THIS administration is granted in divers cases where there is a will, as it may be *durante minore ætate*, *durante absentia*, *pendente lite*, and on other occasions which we shall mention. Administration *durante minore ætate*, is that which is to be granted during the minority of an infant, who, although he may be appointed executor, cannot administer until he arrives at the age of *seventeen*, till which time the ordinary may grant administration with the will annexed,

annexed, and as it is held to whom he thinks fit[c]; in like manner as where there is no teſtament, he may grant it till the infant attains his full age[d]: yet if adminiſtration is granted during the minority of divers executors, he that comes firſt of age ſhall prove the will, and the adminiſtration ceaſes[e]; likewiſe if there be two executors, one of the age of ſeventeen, and the other under, adminiſtration during the minority of him that is under age is void; becauſe he that is of the age of ſeventeen may execute the will[f].

ADMINISTRATION *durante abſentia*, or during abſence, as when the executor may be beyond ſea; this adminiſtration ſeems to ſtand upon much the ſame reaſon as the adminiſtration *durante minore ætate*; it being neceſſary in both caſes that there ſhould be ſome perſon to manage the eſtate of the deceaſed; and therefore it has been held to be grantable by law[g]; and the ordinary may grant it, as he may letters of adminiſtration, where there is no will, and the next of kin be beyond ſea.

LIKEWISE the ordinary may grant adminiſtration *pendente lite*, that is, pending a ſuit: ſo, where there is no controverſy, he may grant adminiſtration until the executor comes in, which, as well as the adminiſtration *durante abſentia* juſt mentioned, do fall of courſe as ſoon as the conſideration ceaſes upon which they were firſt granted[h].

IF the teſtator makes his will, without naming any executor, or if he names incapable perſons, or if the executors named refuſe to act; in either of theſe caſes the ordinary muſt grant adminiſtration with the teſtament annexed, to ſome other perſon[i]: and when the adminiſtration is thus granted, the duty of the adminiſtrator is very little dif-

[c] Godolph. 102. 5 Co. Rep. 29. 3 Mod. 24. 1 New Abr. 381.

[d] See page 5.

[e] Law of Teſt. 416.

[f] Brownl. 46.

[g] Caſe of Clare and Hodges, 1 Lutw. 342.

[h] 2 New Abr. 415.

[i] Black. Com. 2 V. 503, 504.

ferent

ferent from that of an executor, he being to adhere to the teſtament as heretofore mentioned [k].—For obtaining adminiſtration with the will annexed, the will of the deceaſed muſt be proved either in common form or form of law [l], in like manner as was lately ſhewn with reſpect to the executor's proving it; and when the will is ſo proved, the original muſt be depoſited in the regiſtry of the ordinary, and a copy thereof in parchment is made out under the ſeal of the ordinary, and delivered to the adminiſtrator, together with a certificate of its having been proved before him [m]; in like manner as when the will is proved by the executor, notwithſtanding it is called adminiſtration *cum teſtamento annexo*, or adminiſtration with the will annexed.

THUS having proceeded, we come now to treat on the method of proving a will in chancery; and from thence we ſhall proceed with regiſtering a will.

WHEN real eſtate is deviſed by will from the heir at law, and there is no occaſion or opportunity to prove or eſtabliſh the ſame at law, it is often neceſſary to prove ſuch will in *chancery*, to perpetuate the teſtimony thereof: the way to do which is to exhibit a bill againſt the heir at law, and to ſet forth the will *verbatim* therein, ſuggeſting that the heir is inclined to diſpute its validity; and then the defendant having anſwered, they proceed to iſſue as in other caſes, and examine the witneſſes to the will, or prove their hands if they are dead. The will (if the witneſſes are examined in town) muſt alſo be left to be examined in the examiner's office; which done, and publication paſſed, the cauſe is at an end, an order or rules being firſt obtained for publication: and the defendant, who is the heir at law, and examines no witneſſes touching the validity of the will, may give notice of motion for the plaintiff to pay him his

[k] Page 1, 2.

[l] Black. Com. 2 V. 508.

[m] *Ibid.*

coſts

coſts to be taxed by a maſter, which the court uſually orders[n]. This is what is uſually meant by proving a will in chancery, which might be adviſable to do while the witneſſes to the will are living; for in this, as well as in other caſes, where a bill may be filed for perpetuating the teſtimony of witneſſes, it may be that a man's antagoniſt only waits till the death of ſome of them to begin his ſuit, when he may have a more favourable opportunity.

As to regiſtering wills, by ſeveral ſtatutes, deeds and wills, that affect real eſtates, and certain chattels real, in the counties of York and Middleſex, are required to be regiſtered; which regiſtering hath no alluſion to that in the eccleſiaſtical courts, but is quite a diſtinct thing: and being a matter that may be of importance to many, I ſhall here mention the ſeveral ſtatutes by which the ſame is ordained; and then make ſome obſervations with reſpect to effectuating a complete regiſtry.

By the ſtatute 2 & 3 An. c. 4. it is enacted, That a memorial of all wills and deviſes in writing, whereby any honours, manors, lands, tenements, and hereditaments, within the *Weſt-Riding* of the county of *York*, may be any way affected in law or equity, may at the election of the party or parties concerned, be regiſtered in ſuch manner as by the ſaid act is directed: and every deviſe by will of the manors, lands, tenements, or hereditaments, or any part thereof, contained in any memorial ſo regiſtered as aforeſaid, that ſhall be made and publiſhed after the regiſtering of ſuch memorial, ſhall be adjudged fraudulent and void againſt any ſubſequent purchaſer or mortgagee for valuable conſideration; *unleſs a memorial of ſuch will be regiſtered as aforeſaid.* That every ſuch will, or probate of the ſame, of which ſuch memorial is to be regiſtered, ſhall be produced to the regiſter at the time of entering ſuch memorial, and oath made that the memorial was duly ſigned and ſealed; and the regiſter ſhall indorſe a certificate on ſuch will or probate thereof,

[n] 2 Harriſon's Cha. Prac. 38.

and mention the day, hour, and time on which ſuch memorial is entered, expreſſing alſo in what book, page, and number the ſame is entered; and the regiſter ſhall ſign the certificate ſo indorſed; which ſhall be allowed as evidence of ſuch regiſtries in all courts of record. And a memorial of ſuch wills as ſhall be made or publiſhed in London, or in any other place, not within forty miles of the Weſt-Riding, which may affect lands in the Weſt-Riding, ſhall be regiſtered, in caſe an affidavit (wherein one of the witneſſes to the memorial of ſuch will ſhall ſwear, that he ſaw the memorial ſigned and ſealed, before any one of the judges at *Weſtminſter*, or a maſter in chancery) be brought with the memorial to the regiſter; which affidavit ſhall be a ſufficient authority to the regiſter to give a certificate of the regiſtering ſuch memorial; and the certificate ſigned by the regiſter ſhall be evidence of the regiſtry.——That memorials of wills regiſtered within ſix months after the death of the deviſor dying within *England*, *Wales*, and *Berwick*, or within three years after the death of every deviſor dying upon or beyond the ſeas, ſhall be effectual. And in caſe the perſons intereſted in the lands deviſed by reaſon of the conteſting ſuch will, or other inevitable difficulty, without their wilful neglect, ſhall be diſabled to exhibit a memorial within the times limited; in ſuch caſe the regiſtry of the memorial within ſix months after their attainment of ſuch will, or a probate thereof, or removal of the impediment, ſhall be ſufficient.

By ſtatute 6 An. c. 25, it is enacted, That a memorial and regiſtry ſhall be made of all wills which affect any lands or tenements in the *Eaſt-Riding* of the county of York. And by ſtatute 7 An. c. 20, a memorial and regiſtry is to be made of all wills whereby lands are affected in the county of *Middleſex*, in like manner as in the Weſt and Eaſt Ridings of Yorkſhire. But neither of thoſe three ſtatutes extends to copyhold eſtates, or to any leaſes at a rack rent, or to any leaſes not exceeding twenty-one years, where the actual

actual poſſeſſion goeth along with the leaſe; and in the ſtatute of 7 An. there is a reſervation as to the chambers in ſerjeants-inn, the inns of court, and the inns of chancery, to which this act does not extend. By ſtatute 8 Geo. II. c. 6. a regiſtry is to be of all wills affecting lands in the *North-Riding* of the county of York. But this ſtatute does not extend to copyhold eſtates, or to ſuch leaſes as juſt before mentioned.

To effectuate a complete regiſtry, it is neceſſary that the memorial be on vellum or parchment, which need not be ſtamped, as neither of the acts require it. The memorial is to contain, 1. The name of the teſtator and his addition, viz. the place of his abode and occupation. 2. The date of the will. 3. The premiſes, or what is mentioned in the will relative to the real eſtate or chattels real deviſed thereby, which are to be deſcribed *verbatim* as in the will. 4. The names and additions of the witneſſes, viz. their ſeveral occupations and places of abode.——The memorial muſt be ſigned and ſealed by one of the deviſees, his guardians or truſtees; and then atteſted by two witneſſes who ſaw the ſame ſigned and ſealed: afterwards one of the two witneſſes goes with the memorial and the will, or the probate, or an office-copy thereof (either of which is ſufficient), to the regiſter-office (which for the Weſt-Riding of the county of York, is at Wakefield; for the Eaſt-Riding, at Beverley; for the county of Middleſex, in Bell-yard, Carey-ſtreet, London; and for the North-Riding of the county of York, at); and at the office where the ſame is to be regiſtered makes an oath (unleſs an affidavit hath been made before a judge or maſter in chancery, as before mentioned) that he ſaw the memorial ſigned and ſealed; and the oath being ſo made, he leaves the memorial, together with the will, probate, or office-copy, on which the certificate of the regiſtry is indorſed, as directed by the ſtatute, and that frequently within four or five days after; when the will, probate, or

office-copy is fetched, and the regiſter paid his fee for regiſtering.——The form of the memorial is as follows:

A MEMORIAL to be regiſtered purſuant to an act of parliament made for regiſtering deeds, &c. within the [*Weſt, Eaſt, or North Riding of the county of York, or the county of Middleſex*, as may be the caſe].

THE probate of the laſt will and teſtament of A. B. of ——— bearing date the —— day of —— and concerning All [*here purſue the words of the will*] which ſaid will is witneſſed by C. D. of ———; E. F. of ———; and G. H. of ———. And this memorial is required to be regiſtered purſuant to the above mentioned act, by me J. K. one of the deviſees in the ſaid will mentioned: AS WITNESS my hand and ſeal this ——— day of ——— in the year of our Lord 17 .

SIGNED and ſealed in the preſence of } JOHN KEMP. [Place of the Seal.]

CHARLES DUN.
LUKE MITFORD.

FOR regiſtering deeds the form of a memorial varies very little from that uſed for a will; but I ſhall omit mentioning any more here with reſpect to deeds, as being foreign to this ſubject, and ſhall now proceed with what was propoſed with reſpect to proctors fees, and taxing their bills, and therewith conclude this chapter.

IN divers caſes it hath been held, that proctors fees are not ſuable for in the eccleſiaſtical court, but may be ſued for in the temporal courts; from whence a prohibition may be had to ſtop proceeding in the eccleſiaſtical court, if ſuit ſhould be there commenced [n].—Upon proper application, as by petition from any ſuitor, or perſon that ſues in the eccleſiaſtical court, the judge thereof has an undoubted right to tax the proctor's bill. The method of doing it as uſually practiſed is, for the judge to refer it to the regiſter, directing the reſpective parties to attend him if they think fit, one to make his

[n] See Prohibition deſcribed, page 18.

exceptions,

exceptions, and the other to juſtify the ſeveral articles or items of his bill; and the regiſter to make his report to the judge, who thereupon proceeds to tax the bill. If the regiſter has any doubt, the aſſiſtance of the other proctors may be required. The fees alledged to be given to counſel, if denied by the client, as alſo his demand for any unuſual or extraordinary articles which do not appear from the proceedings in the cauſe, muſt be cleared up to the ſatisfaction of the judge, either by the proctor's oath (if he voluntarily offers it, and there be no affidavit to the contrary), or by receipts and vouchers from thoſe to whom the money is alledged to be paid, or by producing letters and orders from his client [o].

CHAP. V.

Of Executors, and ſuch Adminiſtrators who have the Adminiſtration granted with the Will annexed.

THE office and duty of thoſe adminiſtrators who have the adminiſtration granted with the will annexed, being, as we have ſeen in ſeveral parts of this work, very little different from that of executors, we ſhall now take a view of both, as with reſpect to their power and what they are intereſted in; their getting in the deceaſed's effects; and what ſhall be aſſets in their hands to make them chargeable; their office and duty in paying debts and legacies. And as to debts, we ſhall here take notice of ſuch as are barred by the ſtatute of limitations, and of ſome that are to be paid with in-

[o] 2 Burn's Eccleſ. Law, 233.

tereſt; and then of legacies; and when the ſame are to be paid; and what intereſt ſhall be allowed thereon. Likewiſe what executors and adminiſtrators are to obſerve before they pay legacies; and with reſpect to paying infants and married women. In what courts legacies are to be ſued for; and caſes in which ſecurity may be required for paying the ſame; of legacies and bequeſts to charitable uſes. But as ſome of thoſe particulars have been diſcuſſed in the former part of this work, we ſhall now have occaſion only to take a curſory view thereof, and make a little addition to what has heretofore been mentioned; but with reſpect to legacies, which we have hitherto ſcarce touched upon, thoſe will here require a diſcuſſion, as they ſhall have, after ſome notice has been taken of the other particulars.

WITH reſpect to the power an adminiſtrator hath by virtue of adminiſtration obtained from the ordinary; this being very nearly allied to that of an executor, except in a few particular inſtances wherein the executor differs from an adminiſtrator, we need here only refer the reader to the firſt ſection of the ſecond chapter of the Law's Diſpoſal[a]; and to what has been mentioned under the head of proving the will[b], for a diſcovery both of the executor's and adminiſtrator's power. And as what the adminiſtrator is intereſted in hath been treated on, and being the ſame with what an executor, as ſuch, has intereſt in, we may refer to the ſecond ſection of the laſt-mentioned chapter[c], and to what has heretofore been mentioned[d], for a diſcovery both of what an executor and adminiſtrator is intereſted in. And as to getting in the deceaſed's effects, and what ſhall be aſſets in the adminiſtrator's hands to make him chargeable; this likewiſe having been treated on[e], as well as his office and duty in paying debts[f]; and being alike applicable to an executor, we ſhall now make ſome addition to what has been mentioned with reſpect to aſſets, as where any real eſtate is deviſed for paying debts, and where the ſame is mortgaged or

a Page 20.
b Page 173.
c Page 28.
d Page 155, 156, 165.
e Page 43.
f Page 51.

charged

charged with the payment of a ſum of money at the time, or before it was deviſed; that thereby may be ſeen what an executor or adminiſtrator may have for paying the teſtator's debts and legacies with, beſides what has been mentioned [g]. So likewiſe, we ſhall make ſome addition to what was mentioned with reſpect to debts, as concerning thoſe that may be barred by the ſtatute of limitations, and debts to be paid with intereſt.

WHERE any real eſtate is deviſed for paying debts, and the ſame is charged with the payment of a ſum of money, we may obſerve the general rule is, that the perſonal eſtate ſhall be firſt charged with the payment of debts and legacies; and the teſtator cannot exempt it from being liable to his debts, as againſt creditors; but as between heir and executor, he may charge them upon his real eſtate, which is not primarily liable, and diſcharge the perſonal eſtate: but, although there are ſeveral ways by which a man may give his real eſtate for payment of his debts, yet if there be not in the will, either expreſs words, or a manifeſt intent of the teſtator to diſcharge the perſonal eſtate, it ſhall be firſt liable [h]. And in a caſe before the court of chancery, in Eaſter-term, 1782. By the lord chancellor. In order to exempt the perſonal eſtate, the teſtator muſt expreſs his intent. It is not ſufficient to charge the real eſtate, but he muſt ſhew that it is his purpoſe the perſonal eſtate ſhould not be applied [i].

IF a man deviſe real eſtate to be ſold by one for payment of his debts and legacies, and make the ſame perſon his executor, and die; the money made by ſuch perſon upon the ſale of the eſtate, ſhall be aſſets in his hands, and conſequently liable to the payment of the teſtator's debts and legacies [k].——Where real eſtate is deviſed to one for life, with

[g] Page 45—50.
[h] 1 Wilſon Rep. 24.
[i] Caſe of Samwell and Wake, Brown's Cha. Rep. 144.
[k] 1 Roll's Abr. 920.

remainder

remainder to another in fee, and the eſtate is charged with the payment of a ſum of money, either by a former deviſe, rent-charge, or mortgage, the tenant for life ſhall contribute and pay a proportionable part of ſuch ſum [l]; as where the real eſtate was deviſed in the manner juſt mentioned, and being mortgaged for a certain ſum, it was decreed that the tenant for life ſhould contribute one third, and he in remainder two thirds, to redeem [m]; notwithſtanding in this caſe it was obſerved, that the teſtator had left aſſets ſufficient to pay the debts; which the remainder-man prayed might go to the payment of the mortgage, as it would, in caſe the eſtate had not been deviſed, but had deſcended to the heir at law, as heretofore ſhewn [n]. By this it may be perceived, that an executor might have more in his hands for diſcharging debts, than was mentioned in the former part of this work; and with reſpect to legacies, which remain to be conſidered, thoſe claim the next regard; and after the debts are all diſcharged, muſt be paid by the executor, ſo far as his aſſets will extend: and here he is not allowed to give himſelf the preference [o] by retaining, as in the caſe of debts [p]. But before we enter on the diſcuſſion of legacies, we ſhall advert to what was propoſed with reſpect to debts barred by the ſtatute of limitations, and debts to be paid with intereſt.

By ſtatute 21 Ja. I. c. 16, commonly called the ſtatute of limitations, perſons are barred of actions for debts due on ſimple contract, or for arrears of rent, and of actions that may be had for ſome other purpoſes; unleſs the ſame be brought within ſix years after the cauſe thereof commenced, or after the debts or rent became due: but in this act there are exceptions with reſpect to infants, perſons beyond ſea, and ſome others. And there are means by which the bar of the action may be ſaved, and the debt revived; as it is clearly agreed, that if after ſix years, the debtor acknowledges the debt, and promiſes payment thereof, that this revives it and

[l] Caſe of Hayes and Hayes. 1 Cha. Ca. 223.

[m] Caſe of Corniſh and Mew. 1 Cha. Ca. 271.

[n] Page 93.

[o] Black. Com. 2 V. 112.

[p] Mentioned page 27.

brings

brings it out of the ſtatute; as if a debtor by promiſſory note, or ſimple contract, promiſes within ſix years of the action brought, that he will pay the debt; though this was barred by the ſtatute, yet it is revived by the promiſe, which being proved, an action may be ſupported for the recovery of it; the acknowledgment and promiſe being a new evidence of the debt[q]. And if the debtor by his will directs, that all his debts ſhall be paid, or make any proviſion for the payment of his debts in general, this will revive it, and bring it out of the ſtatute, and make his executors liable[r].—Where the debt is conſiderable, and there is danger of its being barred by the ſtatute, it is common for the creditor *within* the ſix years after the ſame was contracted, to ſue out a writ, as by way of commencing an action againſt the debtor; which writ his attorney gets returned by the ſheriff, and then enters it on a roll, which he files with the proper officer; and hereby the debt is ſaved from being barred by the ſtatute at the expiration of ſix years, as it otherwiſe might be.

WITH reſpect to intereſt due on debts, of which mention has been made[s]: It ſeems that where a man *deviſes* his real eſtate for payment of his debts, that thoſe due on ſimple contract, as well as others, ſhall carry intereſt, becauſe the real eſtate being now the fund out of which the debts are to be paid, yields annual profit[t]. Yet where the real eſtate is *charged* only with the payment of debts, lord chancellor Hardwicke ſeemed to think that, *on a general deviſe of lands*, ſimple contract debts ought not to carry intereſt[u].

IN the caſe of *Newton* and *Bennet*, H. 1784, where the defendant, as executor, kept the money of his teſtator in his hands, without accounting for a long time, and employed it in his trade; and being ſued by Newton a creditor. The queſtion was, whether he ſhall pay intereſt? By the lord chancellor. There are many ſayings

q 1 Salk. 28, 29. 5 Mod. 425, 426.
r Prec. Cha. 385.
s Page 57.
t 2 P. Will. 26.
u Barnardiſton, 230.

in

in the books, to prevent it being laid down as a general rule, that an executor ſhall pay intereſt for money uſed in the courſe of his trade; but it does not follow that he may keep the eſtate of his teſtator for a long courſe of time idle, from the perſons entitled to it by the will.——The doctrine I am deſired to lay down is, that an executor may keep his teſtator's money, and apply it to the uſes of his trade, without being liable to intereſt.——It has been argued to this extent, that, if the executor is ſolvent, he ſhall not pay intereſt; if he is not, he ſhall.——I cannot ſee the reaſon of that caſe. It is impoſſible this ſhould have been laid down as the law of the court. I do not ſay, he ſhall pay intereſt on the ground of his having called in a debt which bore intereſt, becauſe an executor has an honeſt diſcretion to call in money which he thinks in hazard; but when it is called in, and made profit of in the way of his trade, I think he ſhould be charged with intereſt. The books ſay, he ſhall not, becauſe it might be loſt, and if it was he muſt have anſwered it.——This argument would apply equally to the caſe, where the executor makes actual intereſt; for the party to whom it is lent may become inſolvent. When the executor did not apply the money to the uſes of the will, or bring it hither, I muſt take it, that he kept it for the purpoſe of making advantage of it in the way of his trade.—From 1760, *Bennet* had not a colour of reaſon for not applying it.—He has not ſhewn any reaſonable cauſe for keeping the money, but has done it merely for the ſake of uſing it in his trade; he therefore muſt be charged with intereſt[x].

IN the caſe of *Perkins* and *Baynton*, E. 1784, where the defendant had made intereſt of money, and the queſtion was, whether he ſhould pay intereſt, and what intereſt, for a ſum of 868l. which he had received as adminiſtrator to his brother, and kept for five years, and from time to time laid it out in government ſecurities? The lord chancellor ordered, that intereſt ſhould be paid upon the 868l. from 1778, when

[x] Brown's Cha. Rep. 359.

it

it came into the defendant's hands, to March 1783, when it was paid into court; and that ſuch intereſt ſhould be at the rate of four *per cent* [z].

LEGACIES, as we have lately hinted, are to be paid after debts; and where there is no time limited for paying a legacy, the executor has one year after the teſtator's death for paying it [a], in like manner as heretofore mentioned concerning diſtribution by the ſtatute [b].—It is held that the ſtatute of limitations is no bar to a legacy, although it may have been due twenty years before demanded [c].

A LEGACY is a bequeſt or gift of goods and chattels by will or teſtament; and the perſon to whom it is given is ſtiled the legatee, which every perſon is capable of being, unleſs particularly diſabled by the common law or ſtatutes [d]; as traitors, popiſh recuſants [e], artificers going out of the kingdom, and exerciſing their trades in foreign parts [f]; perſons for the ſecond offence denying the Trinity, or of aſſerting that there are more gods than one [g], and ſome others.

THIS bequeſt being of goods and chattels, veſts in the executor, as has been mentioned [h], and the legacy is not perfect without his aſſent; for if I have a general or *pecuniary* legacy of 100l, or a *ſpecific* one of a piece of plate, or horſe, or the like, I cannot in either caſe take it without the conſent of the executor [i], whoſe buſineſs it is firſt to ſee, whether there is ſufficient perſonal eſtate left to pay the debts of the teſtator, the ſame being always liable thereto, as we have lately ſhewn [k]. And, in caſe of a deficiency of aſſets, all the general and pecuniary legacies ſhall abate proportionably, in order to pay the debts; but a *ſpecific* legacy is not to abate or allow any thing by way of abatement, unleſs there are

z Brown's Cha. Rep. 375.
a 2 Salk. 415.
b Page 64.
c 2 Freem. Rep. 32.
d Black. Com. 2 V. 512.
e Defined page 102.
f Stat. 5 Geo. I. c. 27.
g Stat. 9 & 10 W. c. 32.
h Page 156.
i Co. Litt. 111.
k Page 201.

not ſufficient without it. So upon the ſame principle, if the legatees have been paid their legacies, they are afterwards obliged to refund a rateable part, if debts ſhould come in more than ſufficient to exhauſt the *reſiduum*, after the legacies paid [l].

WHERE any legacy or perſonal eſtate is given to one, his executors, adminiſtrators, and aſſigns, or any real eſtate to one and his heirs (as is common with reſpect to legacies or perſonal eſtate to ſhew the teſtator's intention, and ſo with reſpect to real eſtate, to ſhew what eſtate the deviſee or perſon to whom the ſame is deviſed ſhould have therein); if the legatee or deviſee die before the teſtator, what was given them will be loſt, the ſame as if a legacy, or if real eſtate ſhould be given to one perſon abſolutely, without any mention of any other perſon to whom it ſhould go in caſe of his death; as here on the death of the perſon to whom the perſonal eſtate is given, if he die before the teſtator, the legacy will undoubtedly be loſt or *lapſed* [m], and ſink into the *reſiduum* of the teſtator's perſonal eſtate; and if wanted for paying debts or other legacies, muſt be applied by the executor for that purpoſe; if not wanted muſt go to the reſiduary legatee if any one is appointed; and if no reſiduary legatee is appointed, then the ſame ſhall be diſpoſed of in manner heretofore ſhewn [n]. And, as to the real eſtate, it will be as if no deviſe thereof had been made, and the ſame will deſcend to the teſtator's heir at law. But if the teſtator by his will gives a legacy, as it may be, of 200l. a piece to his children, payable at their ſeveral ages of twenty-one years, or days of marriage, and directs that if either die, his or her ſhare ſhall go to the ſurvivor; here, if either of the children die before the teſtator, the ſurviving children ſhall have the

l Black. Com. 2 V. 512.

m Caſe of Maybank and Brooks, M. 1780. Brown's Cha. Rep. 84.

n Page 155, 156.

deceaſed's

deceaſed's ſhare, and the legacy will not be lapſed [o].—When a legacy may be extinguiſhed and gone from the legatee by means of a fortune given after the will was made, may be perceived by what has been mentioned under a preceding head [p].

IF a *contingent* legacy, or legacy depending upon ſome event that may or may not happen, be left to any one, this may become a *lapſed* legacy, although the legatee ſurvive the teſtator; as if a man deviſe to his daughter 100l, *when* ſhe ſhall be married, or to his ſon *when* he attains his full age; or *if* he attains the age of twenty-one, and they die before that time, their legacies are lapſed; but it is otherwiſe if the deviſe was to them *to be paid* at their ages of twenty-one [q]; for a legacy to one, to be paid *when* he attains the age of twenty-one years, is a *veſted* legacy; an intereſt which commences *in preſenti*, or immediately on the death of the teſtator, although it be *ſolvendum in futuro*, or to be paid in future; and if the legatee ſurvive the teſtator, although he die before that age, his repreſentatives ſhall receive the legacy out of the teſtator's perſonal eſtate, at the ſame time it would have become payable if the legatee had lived. This diſtinction is borrowed from the civil law; and its adoption in the temporal courts is not ſo much owing to its intrinſic equity, as to its having been before adopted by the eccleſiaſtical courts. For, ſince the chancery has a current juriſdiction with them, in regard to the recovery of legacies, it was reaſonable there ſhould be a conformity in their determinations, and that the ſubject ſhould have the ſame meaſure of juſtice in whatever court he ſued. But if ſuch legacies be charged upon a real eſtate, in both caſes they ſhall lapſe for the benefit of the heir: for with regard to deviſes affecting real eſtate, the eccleſiaſtical court hath no concurrent juriſdiction [r].

[o] 2 Vern. 207.

[p] Page 167.

[q] Law of Teſt. 234.

[r] Black. Com. 2 V. 513.

As

As to intereſt due on *contingent* legacies, and legacies payable to children when they attain twenty-one years. By lord chancellor Hardwicke, in a caſe before the court of chancery. Thoſe kind of caſes, how far a legatee, who is not entitled to the payment of the legacy immediately, ſhall have intereſt in the mean time, depend upon particular circumſtances; as upon relationſhip, upon the neceſſities of legatees, and moſt of them upon the particular penning of wills; ſo that there is hardly one caſe which can be cited that is a precedent for another; and although in theſe caſes ſome things are certain, as where a legacy is given generally at marriage, or at twenty-one, there the veſting and time of payment are the ſame, and ſhall not veſt till marriage or twenty-one, being given generally, as when married or attain twenty-one, without paid or payable being mentioned; and where a legacy is actually veſted, as being given to an infant payable at 21; in either caſe it ſhall not carry intereſt, unleſs ſomething is ſaid in the will that ſhews the teſtator's intention to give intereſt in the mean time. But thoſe caſes are ſubject to this exception, if it is in the caſe of a child; for then, let a teſtator give it how he will, either at 21, or at marriage, or payable at twenty-one, or at marriage, and the child has no other proviſion, the court will give intereſt by way of maintenance; for they will not preſume the father ſo unnatural as to leave the child deſtitute [a].

IN the caſe of *Chaworth* and *Hooper*, T. 1780, where there was a deviſe of the reſidue to an infant payable at 21, with a remainder over, in caſe of her dying under that age. The queſtion was, Whether, as the infant died under age, the intereſt, from the death of the teſtator to that of the infant, ſhould go to the infant's repreſentative, or to the remainder-man, that is, the perſon to whom deviſed, in caſe of the infant's dying under twenty-one? By Mr. baron Eyre, for lord chancellor. The whole reſidue is here given to the infant; What is to become of the produce? Where

[a] Caſe of Heath and Perry, 1744. 3 Atk. 101.

would

would the uſe be if it was a ſpecific thing, or the rents if it was land?—The intereſt is the natural produce. It is not a charge upon any body. The produce muſt go to the perſon who has the thing liable to be diveſted: when diveſted it muſt from that moment go to the perſon who comes in, and decreed accordingly [t].

IT hath been determined, that where a legacy is deviſed generally, and no time aſcertained for the payment, and the legatee be an infant, he ſhall be paid intereſt from the firſt year after the teſtator's death; but if the legatee be of full age, he ſhall only have intereſt from the time of his demand after the year; for where no time of payment is ſet, it is not payable but upon demand, and the legatee ſhall not have intereſt but from the time of his demand, except he be an infant, to whom *laches* or negligence is never imputed. But, where a certain legacy is left, payable at a day certain, it muſt be paid with intereſt from that day [u].

WHERE a legacy is given charged on lands or money in the funds, which yield an immediate profit, and there is no day of payment mentioned, the legacy ſhall carry intereſt from the teſtator's death. But where it is charged on the perſonal eſtate, which cannot be immediately got in, there the legacy bears intereſt only from the end of the year after the death of the teſtator [x].——If a legacy be brought into court, and the legatee hath no notice of it, ſo that it is his fault not to pray to have it, or that the money ſhould be put out, in ſuch caſe he ſhall loſe the intereſt from the time the money was brought into court, unleſs it be put out by the court, which if it is, the legatee ſhall have the intereſt it yields [y].

BEFORE an executor or adminiſtrator pays a legacy, for which he has one year allowed after the teſtator's death,

[t] Brown's Cha. Rep. 82.
[u] Prec. Cha. 161. 2 Salk. 415.
[x] 2 P. Will. 26.
[y] *Ibid.*

where there is no time limited for paying it, as we have lately ſeen [z]; he ſhould firſt obſerve what debts are unpaid, and how far his aſſets, or what he has of the teſtator's eſtate will extend to pay them; ſecondly, what general or pecuniary legacies are to be paid, and what he has to pay them with, and whether it will be neceſſary for any abatement, ſpecific legacies not being to abate if there is enough beſides to pay the debts [a]; and herein it behoves the executor to be careful, the rule being, that where an executor pays a legacy, the preſumption is, he hath ſufficient to pay all legacies, which the court will oblige him if ſolvent to pay [b]. If the executor hath made an inventory in ſuch manner as heretofore ſhewn [c], and there are not effects ſufficient to pay all the legacies, it ſeems, that before he hath paid any legacy he may retain a ratable part or proportionable deduction from the general legacies, in order to pay them proportionably; and herein he cannot prefer himſelf, as has been mentioned [d]. —— On what ſtamps the executor is to have a diſcharge for the legacy he pays, hath heretofore been ſhewn [e].

WITH reſpect to paying legacies to infants; in a caſe where the teſtatrix gave the bulk of her fortune to her executor upon condition that he paid three ſeveral legacies of 100l into the hands of three children, within a year after her death, which the executor accordingly paid; one of the children being then 16 years old, another 14, and the youngeſt 9. And after this the children brought their bill in chancery againſt the executor to be paid their legacies, ſuggeſting that the money paid during their infancy had been imbeziled by their father, who was now inſolvent, and that this was a fraudulent payment to the father. The executor, in his anſwer to the bill, denies that he ever knew of this money coming to the father's hands. By lord chancellor Hardwicke: In caſes where the legacies have

[z] Page 205.
[a] Mentioned page 205.
[b] 2 Vez. 194.
[c] Page 37, 38.
[d] Page 202.
[e] Page 64.

been

been very ſmall, the payment thereof into the hands of minors has been allowed by this court; but in this caſe, notwithſtanding the ſum is above 100l, I will not ſtrain the rules of this court to make an executor pay it over again. Yet, after his lordſhip had looked into the caſes, the next day he ſaid that he found this a very doubtful point; and would not determine it without taking time to conſider thereon, unleſs the executor would agree to give the children ſomething; and upon the recommendation of the court, he agrees to give them 50l to be divided among them, and each ſide were to abide by their coſts; and it was made part of the decree that the 50l was paid by the conſent of the parties [f].

IF a legacy, when due, be paid to the father of an infant, it is no good payment, and the executor may be obliged in equity to pay it over again; as where a legacy of 100l was deviſed to an infant of about ten years of age, and the executor paid it to the father and took his receipt for it; and during fourteen or fifteen years afterwards the ſon reſted ſatisfied, on the father's promiſing to give him the legacy; yet at length the father and ſon being joint traders together, became bankrupts, and this legacy of 100l was, amongſt other things, aſſigned by the commiſſioners for the benefit of the creditors; whereupon the aſſignee brought a bill in the court of chancery againſt the executor for an account and payment thereof. The defendant inſiſted on the extreme hardſhip of his caſe if he ſhould be obliged to pay it over again; and that formerly payment to the father was allowed to be good. But the lord chancellor ſaid he thought the rule of this court, in not ſuffering parents to receive their children's legacies, was founded on very good reaſon; and therefore, to diſcountenance and deter others from paying ſuch legacies to the parents, he decreed for the plaintiff againſt the executor [g].——Where a legacy of 125l

[f] Caſe of Philips and Paget, 1740. 2 Atk. 80.

[g] Caſe of Dayley and Tolferry, 3 Bacon's Abr. 484.

was given to an infant being but ten years old, and the ſame was paid to his father, who died inſolvent, and of whom the executor had taken a bond to be ſaved harmleſs; it was decreed that the executor ſhould pay the legacy over again, for he had paid it at his own peril by taking the bond [h].

IF a legacy be left to an infant under ſeven years of age, the father, or next of kin, on applying to the ſpiritual court, are uſually aſſigned curators, and thereby enabled to ſue for the legacy; and if the minor is above ſeven years of age, he is to chooſe a curator, and requeſt the judge of the court to aſſign him. But although ſuch curator may be aſſigned, it is not adviſable for the executor to pay the legacy until ſuit hath been commenced againſt him; for then he may pay it into the ſpiritual court if the ſuit be there commenced, and he be thereunto cited; and thereby he will be diſcharged [i]. And when ſuits have been commenced in the court of chancery, by guardians for infants legacies, and executors purſuant thereto have paid the money into court, they have been indemnified againſt any future claim.

IN ſeveral caſes relative to paying legacies to infants, it hath been obſerved that, where the legacies were very ſmall, the payment thereof into the hands of infants have been allowed; and in a cauſe before the court of exchequer, M. 1727. it was ſaid by the chief baron, that a legacy might be ſafely paid into the hands of an infant having proper evidence of the payment; as in Wentworth's office of executors [k], where it is laid down, that if the infant be fourteen years of age, the payment of a legacy to him will ſtand good, and if the executor have proof of the payment, he is well enough acquitted from any ſecond payment; and it was thought by Mr. Wentworth, that on demand and acquittance tendered, an executor would be ſafe in paying a legacy to an infant of tender years in the preſence of his guardian [l].

[h] 1 Cha. Ca. 245.
[i] Oughton's Ord. Judiciorum, 358.
[k] Bunb. 240.
[l] Went. Off. Exec. 119, 120.

As to paying legacies to married women; where a legacy of 100 l, being deviſed by a father to his daughter, Elizabeth Palmer, a feme covert; and after the teſtator's death, his executor pays it to Elizabeth, who ſpends it in her own maintenance. Her huſband ſues for it; and the queſtion was, whether this was a good payment to the wife? it being in proof that at the time of making the will, Palmer and his wife lived apart, and the huſband did not allow her maintenance, and ſo it is a ſtrong preſumption that the deviſor intended this for her ſeparate uſe. By the lord keeper: If it had been ſo given in expreſs terms, the payment to her had been good; but as it is, the huſband muſt have it decreed: he ſaid, that in caſe where a tenant paid his rent to his landlady, not knowing that ſhe was married, yet the huſband made him pay it over again, and no help for it.—The will appointing the legacy to be paid within ſix months after the teſtator's deceaſe; the lord keeper likewiſe decreed the huſband intereſt from that time [m].

THE ſpiritual court, and court of chancery, are the courts where legacies are ſued for, the latter exerciſing a concurrent juriſdiction with the former, as incident to ſome other ſpecies of relief prayed by the complainant; as to compel the executor to account for the teſtator's effects, or to aſſent to the legacy, or the like [n]; and a bill may be filed in the court of exchequer for a legacy.

IN ſome caſes an executor may be compelled to give ſecurity for paying a legacy; as where 1000 l was deviſed to a perſon to be paid at the age of twenty-one years; and upon a bill exhibited againſt the executor, ſuggeſting a devaſtavit, and praying that he might give ſecurity to pay the legacy when due, it was decreed accordingly [o]. So where the teſtator deviſed 800 l to an infant, to be paid by his executor when the infant ſhould attain the age of twenty-one years, and the infant by his guardian exhibited a bill, that the executor might give ſecurity for the payment of the mo-

[m] Caſe of Palmer and Trevor, 1 Vern. 261. Law of Teſt. 250. 4 Burn's Eccleſ. Law, 319.

[n] Black. Com. 3 V. 98.

[o] 1 Cha. Ca. 121.

ney, it was accordingly decreed [p]. And if a perſon poſſeſſed of a leaſe for years, deviſe that his executors out of the profits thereof, ſhall pay to every one of his daughters 20l at their full age; the executor may be ſued in the ſpiritual court, to put in ſecurity to pay the legacies; and as this being to iſſue out of a chattel, no prohibition ſhall be granted [q]. But where a legacy was given to a grand-daughter to be paid at 21, or marriage; and if ſhe died before either of thoſe contingencies happened, then to go over to another: lord chancellor Hardwicke was of opinion, that as the legacy was deviſed over, nothing veſted in the grand-daughter till one of the contingencies ſhould happen; and therefore ſhe was not intitled to have it ſecured [r].

WITH reſpect to legacies and bequeſts to charitable uſes, it has been mentioned, that upon the conſtruction of the ſtatute 9 Geo. II. c. 36, a deviſe of land to truſtees to be turned into money, and the money to be laid out in a charitable uſe, is not good; likewiſe, that a deviſe of a mortgage or term of years, to be laid out in a charity, is void: and if money be given to be laid out in lands, this is expreſsly within the act; but money given generally is not [s]. If money be given to be laid out *in lands or otherwiſe*, to a charitable uſe, it hath been determined that ſuch deviſe is good, by reaſon of the words [*or otherwiſe*]. As where a man, in 1738, made his will in theſe words; "I will and deſire, "that my executors, within twelve months after my de- "ceaſe, do ſettle and ſecure, by purchaſe of lands of in- "heritance, or otherwiſe, as they ſhall be adviſed, out of "my perſonal eſtate, one annuity or yearly payment of "50l, to be paid yearly and diſtributed for ever, by my "executors their heirs and aſſigns, among the poor and "indigent people of Leeke, in the county of Stafford, in "ſuch manner as they ſhall think fit. And my will alſo is, "that my executors do ſettle and ſecure one other annuity

[p] Law of Exec. 187.
[q] 1 Roll's Abr. 285.
[r] 1 Atk. 505.
[s] Page 137, 138.

of

" of 5l, to be paid yearly to the vicar of Leeke for the " time being for ever, for preaching an annual ſermon on " the 12th day of October." And the teſtator deviſed the reſidue of his perſonal eſtate, to be equally divided between his ſiſters, Mrs. Soreſby and Mrs. Hollins. By the lord chancellor Hardwicke: The only queſtion in this caſe is, whether the deviſe of the two annuities of 50l and 5l to charitable uſes, is void by the late ſtatute of mortmain? I am of opinion, upon this act of parliament, that this bequeſt was not void, and that there is no authority to conſtrue it to be void, if by law it can poſſibly be made good. The act of parliament is not at all aimed againſt perpetual charities *merely as ſuch*, or to prevent the eſtabliſhment or creation of them, but is deſigned againſt the caſes of perpetual charities *in lands*, and (as the title imports) to reſtrain the diſpoſition of lands whereby the ſame become unalienable. The whole recital, and enacting part of the ſtatute, take notice only of the unalienable diſpoſal of land, whereby heirs are diſinherited; and therefore the alienation and conveyance of lands to ſuch purpoſes are prohibited. And although there is a clauſe to prohibit money being laid out in lands to ſuch purpoſes as would make them unalienable; yet there is no reſtriction whatſoever upon any one for leaving a ſum of money by will, or any other perſonal eſtate to charitable uſes, provided it be to be continued as a perſonalty, and the executors or truſtees are not obliged or under a neceſſity of laying it out in land by virtue of any direction of the teſtator for that purpoſe. If a deviſe in a will is in the disjunctive, and leaves to the executors two methods to do a particular thing by, the one lawful, and the other prohibited by law; can any court ſay, becauſe one method is unlawful, that therefore the other is ſo, and the whole bequeſt void? No; for if one bequeſt is lawful, that ſhall be purſued, and take effect. It hath been argued againſt this deviſe, that the words [*for ever*] ſhew the annuities muſt ariſe out of

ſome real eſtate, which only is capable of ſupplying them for ever; for perſonal funds are too periſhable and tranſitory in their nature to anſwer ſuch everlaſting annuities; and if a particular ſum were veſted in ſtock, with deſign to purchaſe a particular yearly ſum or annuity, it may happen the company may be quite diſſolved, or the ſtock may fall, or intereſt be ſo reduced, that half the annuity may not be produced. But theſe objections may be over-ruled. For if the company ſhould be diſſolved, the principal ſtock may be taken out, and veſted in ſome other company. And there may be annuities that may probably continue for ever, and yet not payable out of land. I will mention an inſtance of one, which has laſted a century and a half, and may exiſt perpetually; which is, Sir Thomas White's charity, being a diſpoſition of money to be employed by continual rotation, in loans to poor tradeſmen, of ſeveral ſums to be let for a ſettled number of years, and then to be repaid. And any man may, at this day, give by will a perpetual charity in this manner. But if a man by will ſecures ſuch loans by lands, or purchaſe of lands; ſuch deviſe ſhall be void, and contrary to the late ſtatute of mortmain. After his lordſhip had diſcuſſed another point of argument brought againſt this deviſe, as that the words [*heirs and aſſigns*] did import a purchaſe in land, or ſome real thing; he ſays, I am of opinion, upon the whole, that there is nothing that makes this bequeſt void in every part; but that it is good in that way which the law does not forbid. But I would not have it queſtioned, if a man ſhould by his will direct a ſum of money to be laid out in land, or upon rent-charge to be ſecured upon land for any charity, and in the mean time (till it can be laid out) to be inveſted in government ſecurities for the benefit of the charity, but that ſuch bequeſt will be void; becauſe the final end and intention of the teſtator was to diſpoſe of his money in land, and the inveſtiture of it in government and perſonal ſecurities till a proper purchaſe of land

land or rent-charge offered.——As to the annuity of 5 l, there are fewer objections to that than to the other: for there is no direction at all for any money or perſonal eſtate to be laid out in land; for the executors are only willed to *ſecure and ſettle* 5 l *a year* for the purpoſe there mentioned, and it muſt be ſecured upon a perſonal fund conſiſtent with the will and intention of the teſtator, and not contradictory to the words of the act of parliament.——And as it is often ſaid in the old books by the judges, that "I was by at the "making of the act of parliament, and the meaning and "intention of it was then ſaid to be this or that;" ſo I was by at the making of this ſtatute, and it was at that very time ſaid by the legiſlature, that it would not hinder any charitable diſtribution of a perſonal eſtate. Therefore it was decreed that the deviſe was good; and that the money ſhould be veſted in South Sea Stock, for the charitable purpoſes mentioned in the will [t].

MONEY given for erecting an hoſpital or ſchool, hath been determined not to be within the before-mentioned act of 9 Geo. II. As in the caſe of *Vaughan* and *Farrer*, Feb. 1751. John Allen, by his will, gave money to truſtees to erect, in ſome convenient place in or near the city of York, an hoſpital for the ſupport and maintenance of as many poor old men as the ſurplus of his effects would admit of, and to put in as many as they ſhould think proper in their diſcretion. And a bill being brought in the court of chancery for conteſting the validity of the teſtator's will. In the argument for ſupport of this charity, was cited the caſe of *Gaſtril* and *Baker*, 31ſt March 1747; which was, where the teſtator's repreſentatives had brought a bill for the reſidue of the perſonal eſtate undiſpoſed of by will, againſt the truſtees, who were alſo executors, and who claimed it for the charity in the will, in theſe words: "I give all the reſt and reſidue

[t] 2 Burn's Eccleſ. Law, 495.

"of

" of my eſtate, of what nature ſoever, to truſtees; in order " to, and towards erecting a ſchool for the education of poor " boys," in ſuch place, and in ſuch manner, as the truſtees ſhould appoint. This was inſiſted to be a lapſed legacy by the mortmain act, and that erecting a ſchool muſt mean buying and building. But the lord chancellor held, that erecting included the founding, and conſequently the maintenance of the maſter; which was a different thing from the mere ſchool place itſelf; but that the end might be obtained by hiring a houſe. And directed accordingly.——By the lord chancellor Hardwicke: This caſe comes very near that of the ſchool. For a ſchool imports there ſhould be ſome place in which the children ſhould be taught; for it cannot mean that it ſhould be *ſub dio*, or in the open air. So doth an hoſpital import ſome place in which theſe people ſhould be entertained. There is no direction in this will, that any part of this money ſhould be laid out in building an hoſpital; for *erect* as well imports foundation as building; and therefore it was ſo conſtrued in the caſe of the ſchool; and ſo is the word *erigimus* conſtrued in charters of the crown and private foundations. There is nothing in the ſtatute prohibiting giving perſonal eſtate to charity, provided it is not to be laid out in land; and the words of the ſtatute are applied to improvident alienations to diſinheriſon of heirs. If a large perſonal eſtate is left to truſtees for a charitable uſe, which they direct, and there is no occaſion to come to a court of equity for direction, there is nothing in this ſtatute reſtraining the truſtees from laying out that in land; becauſe by the expreſs proviſo, all purchaſes to take place in poſſeſſion, are good notwithſtanding this act of parliament, which is a matter may perhaps want a remedy. If indeed theſe truſtees were to come to this court for an eſtabliſhment, I ſhould never direct it to be ſo laid out in land; but there is nothing illegal diſabling the truſtees from privately doing

ing it; becauſe the ſtatute makes good all purchaſes to take effect immediately in poſſeſſion. It is ſaid, two purpoſes are to be anſwered; one, the erecting, the other, the maintenance of the perſons: and that ſuppoſing the court ſhould take it in the latitude I now do, as to the endowment and proviſion for the poor, that may be anſwered by putting it out on the funds, yet the hoſpital cannot be without a building; that land ſhould be bought for that; and the plaintiff ought to have the benefit of ſo much as the maſter [u] ſhould think the value. I wiſh I could come at that for this plaintiff, who is as much, or more perhaps, an object of charity, than any of theſe people who may come into this hoſpital. It is unfortunate; but yet I muſt go according to ſuch rules as will hold good in other caſes. Suppoſe this happened before the ſtatute, would it have been neceſſary, any part of this money ſhould be laid out in land to build an hoſpital? If the truſtees had come before the court, and laid a ſcheme, that a certain perſon would give a piece of ground to build this upon; or if they had ſaid, there were in *York* ſeveral charitable foundations belonging to the city, and they would let them build thereon for this hoſpital; the court would undoubtedly have accepted it. Nay, they might have ſaid they would take a houſe in *York* for that purpoſe: there is nothing in this ſtatute reſtaining the giving money to build. The act of parliament meant to leave perſons to diſpoſe of perſonal eſtate for a perpetual charity, but meant to prevent the great miſchief of giving land for that, or money to be laid out in land; as that would lock up land from being uſed in a commercial way, which would be a detriment to the publick [w].

IN the caſe of the *Attorney General* and *Bowles*, July 24, 1754. William Bowles by his will in 1745, gave to

[u] The maſter is an officer of the court, and called a maſter in chancery, of whom there are twelve in number, including the maſter of the rolls. To thoſe matters are referred to be examined.

[w] 2 Vezey, 182.

truſtees

truſtees 500 l, out of his perſonal eſtate, upon truſt to lay out part thereof in erecting a ſmall ſchool-houſe, and a little houſe adjoining for the maſter to live in; the whole purchaſe and building not to exceed 200l; the remaining 300 l to be laid out in the purchaſe of land, or ſome *real ſecurity*, for the maintenance of the maſter. It was urged, that *real ſecurity* meant ſubſtantial, good, and effectual ſecurity, and therefore was not within the ſtatute of 9 Geo. II. But lord chancellor Hardwicke held otherwiſe, and that he muſt take the word *real* in the known, legal, ſignification of it, and could not annex a new idea to it; therefore, the 300 l legacy was void within that ſtatute: but as to the 200 l, if they could get a piece of ground by the gift or generoſity of any perſon, not by purchaſe, they might be at liberty to apply to the court to lay out that 200l in erecting a ſchool-houſe thereon, but not to be laid out in land to build upon [x].

IN the caſe of *Widmore* and the governors of the corporation of Queen *Ann*'s bounty, December 12, 1766, Mr. *Woodroffe* the teſtator gave 200 l to the corporation of Queen *Ann*'s bounty, to augment poor livings; and directed his executors to divide the reſidue of his perſonal eſtate into three parts, and to pay one third to the corporation of Queen *Ann*'s bounty, or the ſociety for propagating the goſpel; another third to his moſt neceſſitous relations, by his father's or mother's ſide; and the third *to ſome publick charity*. The legacy to the corporation of Queen *Ann*'s bounty being held to be void, as by the rules of that inſtitution, it muſt be laid out in land; the third of the reſidue which was given to the ſame charity, or the ſociety for propagating the goſpel, was ordered on the ſame account to be paid to the latter; and the legacy of the other third to

[x] 2 Vezey, 547.

ſome

ſome publick charity, was declared to be good; but that the executor ought to diſpoſe of it under the eye of the court, and therefore were to propoſe a charity to the maſter[y].

HENCE we may perceive how landed property is guarded from being affected by a deviſe or bequeſt to a charitable uſe; and yet no reſtraint is laid on money being deviſed to ſuch uſe; but it is well in a deviſe thereof to bodies corporate, companies, hoſpitals, &c. to be accurate in deſcribing them.

IN the caſe of the *Attorney General* and *Hickman*, J. S. by his will duly executed, gave his eſtate to B, his heirs, executors, and adminiſtrators; and by a codicil written by himſelf and not atteſted by three witneſſes, declared the uſe to which he would have his eſtate applied, in the words following: "I would have the ſame employed for encou-"raging ſuch nonconformiſt miniſters as preach God's "word in the place where the people are not able to allow "them a ſufficient ſuitable maintenance; and for the en-"couraging the bringing up ſome to the work of the mini-"ſtry, who are deſigned to labour in God's vineyard "among the diſſenters: the particular method how to diſ-"poſe of it I preſcribe not, but leave it to their diſ-"cretion, deſiring you (meaning B) to take advice of C "and D." B, C, and D, all died before the teſtator. In this caſe two queſtions aroſe, 1. Whether both the truſtees, to whom the diſpoſition and appointment of the ſaid charity was given, dying in the lifetime of the teſtator, that charity was not gone, and in the nature of a lapſed legacy? By King lord chancellor: The ſubſtance of the charity remains, notwithſtanding the death of the truſtees before the teſtator; and though at law it is a lapſed legacy, yet in equity it is ſubſiſting; and here is a ſufficient certainty of the teſtator's intention to revive it. The

[y] Brown's Cha. Rep. 13.

intention

intention therefore of the party is ſufficiently manifeſt that this charity ſhould continue within 43 Eliz. c. 4. The ſecond queſtion, whether this be a ſuperſtitious uſe within 1 Edw. 6. c. 14. diſſenters being ſuch general words as comprehend any perſons however oppoſite to the church of England. By the lord chancellor: This cannot be a ſuperſtitious uſe within the ſtatute; the diſſenters here meant are proteſtant diſſenters acting under the toleration act 1 W. & M. c. 18.: and decreed the *reſiduum* of the teſtator's eſtate to be diſpoſed of to the charity, and ordered a ſcheme to be laid before him for that purpoſe [z].

IN the caſe of *White* and *White*, July 28, 1778. Richard Holt, poſſeſſed of a conſiderable perſonal eſtate, made his will in 1769; and after giving various legacies, diſpoſed of the *reſiduum* of his eſtate in manner following: one half thereof he gave to the *Foundling Hoſpital*; and, *if there ſhould be more than one of the latter, then to ſuch of them as his executor ſhould appoint.*—He then appointed A B of, &c. his executor; but the teſtator afterwards ſtruck out the executor's name, and appointed no other executor, and died in 1775. *Benjamin White*, the plaintiff, proved the will as a teſtamentary paper, and took adminiſtration with the paper annexed, as one of the next of kin [a]. The defendants are the other next of kin, and the governors of the *Foundling Hoſpital*, and of the ſeveral *Lying-in Hoſpitals.*—The plaintiff in his bill inſiſts that the deviſe of the moiety to the *Lying-in Hoſpital* became void by ſtriking out the name of the executor, who was to appoint, and that it ſhould be referred to the maſter to report who are entitled as next of kin. The defendants, the next of kin, alſo claim that moiety as being void. In ſupport of the bill it was argued, that the appointment of the executor being revoked, the deviſe itſelf is revoked, there being now no perſon exiſting who can appoint; and that the teſtator having revoked the executor's name, he meant to revoke the deviſe. For the hoſpitals, the obliteration of the name ſhall not defeat the

[z] 2 Eq. Caſ. Abr. 193.

[a] Took the adminiſtration in ſuch manner as has been deſcribed, page 193, 193.

intent,

intent, ſo as to prevent the money from going to ſome one or all the lying-in hoſpitals. It is impoſſible it ſhould go as it was left; but the court will ſtand in the executor's place. All the rules ſhew great latitude and liberality of conſtruction, and where the teſtator refers to any perſon who cannot act, the court will carry the deviſe into execution as near as may be. The caſes prove, that where money is indefinitely given, the court will exerciſe its judgment: If the teſtator had given it to ſuch a charity as the executor ſhould name, the court muſt have applied it. By the lord chancellor: My notion is, that in the caſe of charities, this court derives a great latitude of authority from the extenſive nature of moſt charities; becauſe they cannot go upon the ſame ſtrict rules which prevail in private caſes: but that is well reſolved into the purpoſe and the mode. Where the teſtator is willing it ſhall go in the largeſt extent, the court will follow his intent in marking out objects. I wiſh to purſue this method of conſtruing the intent of teſtators.——The queſtion is here, whether the legacy is void, the executor's name being ſtruck out, and there being no perſon upon whom it could devolve, or whether the court will ſuſtain it? It has been argued, that the court has great extent of juriſdiction, in making legacies certain which were before uncertain; and ſecondly, in applying them where it is not known to what uſe they were intended. There has been at all times an exerciſe of this authority, where a legacy has been doubtfully given. Here the teſtator giving a legacy to the next of kin, and to the executor names a particular charity, a reſiduary legatee; the queſtion is only, how the truſt ſhall be carried into execution? I remember to have read a caſe ſomewhere, where a legacy is given to B, for the benefit of nonconforming miniſters, with the advice of C and D. At the teſtator's death B, C, and D were all dead, yet the court ſuſtained the legacy [b]. It muſt be referred to a maſter, to which of the lying-in hoſpitals it ſhall be paid [c].

[b] This was the caſe of the Attorney General and Hickman, mentioned page 221.

[c] Brown's Cha. Rep. 12.

APPEN-

APPENDIX.

INTRODUCTION

TO THE

FORMS OR PRECEDENTS

HERE LAID DOWN.

A WILL is to be written on paper or parchment without a ſtamp; and whether it be begun with theſe words, "In the name of God, amen," or with theſe, "This is the laſt will and teſtament," is immaterial; yet the former ſeeming to be the moſt uſual method, I have here purſued it. The teſtator ſhould be careful in giving a proper deſcription of himſelf, as with reſpect to his chriſtian and ſurname, his place of abode, and his trade or occupation; which is uſually termed his *addition*. Women, who were never married, uſe the addition of *ſpinſter*. Widows, that of *widows*; which are ſufficient without mentioning any trade or buſineſs. It is well to inſert the uſual clauſe, as, *being in health of body*; or, *being ſick in body, but of ſound mind*, &c.

WITH reſpect to legatees, thoſe ſhould be properly deſcribed, as thereby they may be diſtinguiſhed from any others. The will ſhould be dated as of the day and year when the teſtator ſigned it, the reaſon whereof was ſhewn in page 152; and the teſtator ſhould put his ſeal thereto as well as his name; for although this is not required by the ſtatute of 29 Car. II. even with reſpect to real eſtate, and as to perſonal eſtate, we have

ſeen in page 154, that leſs formality is required in executing a will thereof, than of a will whereby real eſtate is affected; and that two witneſſes are ſufficient, where the will does not concern real eſtate: yet if a man derives his power of diſpoſing from any deed, by which it is expreſſed, that he ſhall diſpoſe by writing, under his hand and ſeal, &c. it is neceſſary for the teſtator to ſeal his will; as by an omiſſion thereof the diſpoſition hath been held void. And it has been held, that ſealing a will is not a ſufficient ſigning within the ſtatute; therefore, it is prudent for the teſtator both to ſign and ſeal his will in ſuch place, as we ſhall point out at the concluſion of each of the forms or precedents hereafter laid down, where ſome further obſervations will occaſionally be made.

NUMBER I.

A MAN, poſſeſſed of Money, Plate, Houſehold Goods, a Leaſehold Eſtate for Years; another for Years determinable on the Deaths of Three Perſons named in the Leaſe; and having divers Sums of Money due to him; but is not poſſeſſed of any real Eſtate, *gives the whole to his Wife.*

IN THE NAME OF GOD, AMEN. I John Stiles, of Cheapſide, in the City of London, Linen-draper, being in health of body and of ſound mind, memory, and underſtanding, praiſed be God for the ſame, do make this my laſt will and teſtament in manner and form following: I give, deviſe, and bequeath, unto my beloved wife Mary Stiles, all my money, ſecurities for money, goods, chattels, eſtate and effects, of what nature or kind ſoever: To HOLD the ſame unto my ſaid wife, her executors, adminiſtrators, and aſſigns. AND I do nominate, conſtitute, and appoint my ſaid wife ſole executrix of this my laſt will and teſtament, hereby revoking and making void all and every other will or wills at any time heretofore by me made, and do declare this to be my laſt will and teſtament. IN WITNESS whereof

whereof I the ſaid John Stiles have hereunto ſet my hand and ſeal this day of in the year of our Lord 17 [a].

SIGNED, *ſealed, declared, and publiſhed, by the abovenamed John Stiles, as and for his laſt will and teſtament, in the preſence of us, who, at his requeſt, and in his preſence, have ſubſcribed our names as witneſſes thereto* [b],

JOHN STILES. [Place of the Seal.]

THOMAS JONES [c].
RALPH HICKS.

NUMBER II.

AN UNMARRIED WOMAN, or SPINSTER, poſſeſſed of Money, Houſehold Goods, and other perſonal Eſtate.

1. *Wills to be decently buried in her Pariſh Church.*
2. *Gives* 500*l to one Brother,* 600*l to another, and* 300*l to a Nephew, to be paid when he attains* 21 *Years of Age; the Intereſt whereof, in the mean time, to be applied towards his Maintenance and Education.*
3. *Reſidue to a Brother whom ſhe appoints Executor.*

IN THE NAME OF GOD, AMEN. I Sarah Matthews, of German-ſtreet, in the pariſh of Saint James, in the liberty of Weſtminſter, and County of Middleſex, ſpinſter, being in health of body and of ſound mind, memory, and underſtanding, praiſed be God for the ſame, do make this my laſt will and teſtament in manner and form
1. following: FIRST, I will and deſire that I may be decently buried in the pariſh church of Saint James
2. aforeſaid; AND I give and bequeath unto my brother John Matthews the ſum of 500l; ALSO, I give and

[a] Figures are put here for the ſake of brevity, and ſo in the other forms hereafter laid down; yet it is proper to write the whole of the will in words, and that without any contractions.

[b] If the teſtator makes two parts of his will, as has been mentioned to be ſometimes done, p. 126, ſay, next after the word "*thereto,*" *as we have likewiſe done to a duplicate thereof.*

[c] Witneſſes ſhould be diſintereſted perſons, as ſhewn p. 153.

bequeath unto my brother William Matthews, the ſum of 600l[c]: ALSO, I give and bequeath to my nephew William Matthews, ſon of my brother Thomas Matthews, deceaſed, the ſum of 300l; to be paid to my ſaid nephew, when he attains twenty-one years of age; and the intereſt thereof in the mean time to be paid and applied towards his maintenance and education, in ſuch manner as my executor hereinafter named, ſhall in his diſcretion think fit. ALL the reſt and reſidue of my money, goods, chattels, eſtate, and effects, of what nature or kind ſoever, I give and bequeath unto my brother James Matthews: AND I do nominate, conſtitute and appoint my ſaid brother James, ſole executor of this my laſt will and teſtament; hereby revoking and making void all and every other will and wills at any time heretofore by me made, and do declare this to be my laſt will and teſtament. IN WITNESS whereof I have hereunto ſet my hand and ſeal, this — day of in the year of our Lord 17 .

3.

SIGNED, ſealed, &c. [*as in* No. I.] } SARAH MATTHEWS. [Place of the Seal.]

NUMBER III.

A WIDOW, poſſeſſed of Goods and Houſes held by Leaſes for Terms of Years.

1. *Gives an Houſe and ſome Houſehold Goods to a Son.*
2. *Another Houſe to a Daughter.*
3. *Reſidue to another Son, and appoints him Executor.*

IN THE NAME OF GOD, AMEN. I Mary Kemp, of the borough of Honiton, in the county of Devon, widow, being ſick and weak in body, but of ſound mind and memory, praiſed be God for the ſame, do make and declare this my laſt will and teſtament, in manner and form following: I give, deviſe, and bequeath unto my ſon John Kemp,

1.

[c] When there is no time limited for paying a legacy, the executor has one year after the teſtator's death for paying it, as ſhewn p. 205.

his

his executors, adminiſtrators, and aſſigns, all that leaſehold dwelling-houſe, meſſuage, or tenement, ſituate and being in the borough of Honiton aforeſaid, now in the tenure or occupation of Francis Holland: AND ALSO, my bureau and book-caſe with glaſs doors, my ſilver quart two-handled cup, marked I. M. K. my large mahogany ſquare table,
2. and mahogany pillar and claw table. ALSO, I give, deviſe, and bequeath unto my daughter Elizabeth Kemp, her executors, adminiſtrators, and aſſigns, all that my leaſehold dwelling-houſe, meſſuage, or tenement, ſituate and being in the pariſh of Coombrawley, in the ſaid county of Devon, and now in the tenure or occupation of Thomas Jones.
3. ALL the reſt, reſidue and remainder of my eſtate and effects, of what nature or kind ſoever, I give, deviſe, and bequeath unto my ſon Thomas Kemp; and I do hereby nominate, conſtitute and appoint my ſaid ſon Thomas ſole executor of this my laſt will and teſtament: IN WITNESS whereof I have hereunto ſet my hand and ſeal, this day of in the year of our Lord 17 .

SIGNED, ſea'ed, &c. [*as in* No. I.] } MARY KEMP. [Place of the Seal.]

NUMBER IV.

A MARRIED WOMAN by virtue of a Settlement made previous to her Marriage, diſpoſes of perſonal Eſtate.

1. *Mentions her Marriage Settlement.*
2. *Gives* 200*l* *to her Huſband*; 100*l* *to her Brother*; *and* 100*l* *to a Couſin.*
3. *Reſidue to be equally divided between a Nephew and Niece, if living at Teſtatrix's death*; *if either be dead, deceaſed's Share to go to the Survivor.*
4. *Appoints her Brother ſole Executor.*

IN THE NAME OF GOD, AMEN. I Elizabeth Mills, now wife of John Mills, of the pariſh of Saint Margaret, Weſtminſter, in the county of Middleſex, Eſquire, late Eliza-
1. beth Field, ſpinſter, being ſick and weak of body, but of ſound and diſpoſing mind, memory, and underſtanding,

praiſed be God for the ſame, do hereby, in purſuance and exerciſe of the power and authority given and reſerved to me, in and by the ſettlement made previous to my marriage with the ſaid John Mills, and by force and virtue of all and every the power and powers, authority and authorities in me being, or enabling me thereto[d], make my laſt
2. will and teſtament in manner following, that is to ſay, I give and bequeath unto my beloved huſband, the ſum of 200l. ALSO, I give and bequeath unto my brother William Field the ſum of 100 l. ALSO, I give and bequeath
3. unto my couſin Ann Soam, widow, the ſum of 100 l. ALL the reſt, reſidue and remainder of my eſtate and effects of what kind or nature ſoever which I have or ſhall have right to diſpoſe of, I give and bequeath unto my nephew and niece, James and Mary Field, equally to be divided between them, in caſe they are both living at the time of my death; but if either of them ſhall happen to die before me, then I give and bequeath the ſhare of him or her ſo dying to
4. the ſurvivor of them. AND I do hereby nominate, conſtitute and appoint my brother, William Field aforeſaid, ſole executor of this my laſt will and teſtament. IN WITNESS whereof I have hereunto ſet my hand and ſeal the day of in the year of our Lord 17 .

SIGNED, ſealed, &c. [*as in* No. I.] } ELIZABETH MILLS. [Place of the Seal.]

[d] It is uſual at the beginning of a married woman's will to mention, or as it is properly termed, to recite the ſubſtance of the deed of ſettlement, or bond, if ſhe derives her power of bequeathing from a bond; as the date thereof, the parties thereto, the eſtate or effects ſettled or mentioned therein, and the power the wife has thereby for diſpoſing; which is commonly done in the ſame or like words as are contained in the ſettlement or bond: yet as it often happens when a married woman has a deſire to make her will, that ſhe cannot immediately have recourſe to her deed of ſettlement or bond (the ſame being uſually lodged in a truſtee's hands), I have here laid down this conciſe method, whereby a married woman may effectually diſpoſe of eſtate or effects, provided ſhe has ſufficient power by virtue of any ſettlement made previous to her marriage for ſo doing. See pages 142, 143, 144.

NUMBER

NUMBER V.

A MAN having Money, Goods, and Effects, but no real Eſtate.

1. *Gives to his Son* 400 *l. To a Daughter,* 300 *l.*
2. *To two Daughters,* 300 *l each, to be paid when they attain their ſeveral Ages of* 21 *Years, or be married: The Intereſt, in the mean time, to be applied for their Maintenance.*
3. *Proviſo, if the Daughters marry under Age, and without their Mother's Conſent, their Legacies to go to firſt-mentioned Son and Daughter.*
4. *Gives to Wife the Uſe of Houſehold Goods during her Life, and the whole thereof to his Son after her Death.*
5. *Reſidue to Wife, who is made Executrix.*

IN THE NAME OF GOD, AMEN. I John Tomkin, of the pariſh of Saint Martin in the Fields, in the county of Middleſex, Baker, being in health of body, and of ſound mind, memory, and underſtanding, praiſed be God for the ſame, do make this my laſt will and teſtament in manner
1. following: I give and bequeath to my ſon Thomas Tomkin, the ſum of 400 l, and to my daughter Mary Tomkin,
2. the ſum of 300 l. ALSO, I give and bequeath unto my daughters Jane and Frances Tomkin, the ſum of 300 l, each to be paid when, and as they attain their ſeveral and reſpective ages of 21 years, or on the day or days of their reſpective marriage which ſhall firſt happen, provided they marry with conſent as hereafter mentioned; and until my ſaid daughters Jane and Frances, ſhall ſo attain their ages of 21 years, or be married, my will is that the intereſt and produce of their ſeveral legacies ſhall be paid and applied towards their maintenance and education, in ſuch manner as my executrix hereinafter named, ſhall according
3. to her diſcretion think fit: PROVIDED always, nevertheleſs, and my will and mind is, that in caſe one or both of my ſaid daughters Jane and Frances ſhall marry before having attained 21 years of age, and without having firſt obtained conſent in writing under the hand of my ſaid executrix, then from and immediately after ſuch one or both of them

as may be ſo married, I do hereby give and bequeath the legacy or ſaid ſum of 300 l of ſuch of my ſaid two daughters as ſhall be married, without having obtained conſent as aforeſaid, unto my ſaid ſon Thomas, and my daughter Mary Tomkin, equally to be divided between them[e].

4. AND I do hereby give to my wife Elizabeth Tomkin, the uſe of all my plate, linen, china, houſehold goods and furniture, which ſhall be in my dwelling-houſe at the time of my death, TO HOLD, uſe, occupy, and poſſeſs the ſame during her life; and from and immediately after her death, I give and bequeath the ſaid plate, linen, china, houſehold goods and furniture, unto my aforeſaid ſon Thomas Tom-

5. kin, his executors, adminiſtrators, and aſſigns. ALL the reſt, reſidue, and remainder of my money, goods, chattels, eſtate and effects, of what nature or kind ſoever, not herein before given and diſpoſed of, after payment of my juſt debts, funeral expences, and the expence of proving this my will, I give and bequeath unto my ſaid wife, her executors, adminiſtrators and aſſigns; and I do make, nominate, conſtitute and appoint my ſaid wife ſole executrix of this my laſt will and teſtament, hereby revoking and making void all and every other will and wills at any time heretofore by me made, and do declare this to be my laſt will and teſtament. IN WITNESS whereof I have hereunto ſet my hand and ſeal the day of in the year of our Lord 17 .

SIGNED, ſealed, &c. [*as in* No. I.] } JOHN TOMKIN. [Place of the Seal.]

[e] If a legacy in this caſe is not given over to another, the condition will not be effectual, as mentioned page 360.

NUMBER

NUMBER VI.

A MAN having a large Stock in Trade, and other perſonal Eſtate, to a conſiderable Amount; but no real eſtate.

1. *Takes Notice that Wife is provided for by Settlement, and as a Token of Love gives her ſome Plate, Houſehold Goods, and Mourning.*
2. *Give Legacies to two Brothers for Mourning.*
3. *Legacies to Executors for Care and Trouble.*
4. *Reſidue of Houſehold Goods, Chattels, Stock in Trade, Eſtate and Effects, to two Perſons upon Truſt to ſell, and the Money ariſing therefrom, and from Debts due to him, to place out at Intereſt for the Benefit of his Son and two Daughters, and ſuch other Children as he might have living, or his Wife be enſient with at the Time of his Death. The Intereſt to be applied towards their Maintenance and Education, and the Principal to be paid at their ſeveral Ages of twenty-one Years. In caſe any or either die under Age, leaving Iſſue, ſuch to have their Parents Share; and in caſe of all their Deaths without Iſſue, Wife to have the Whole. If ſhe be then dead, Teſtator's Brothers to have it.*
5. *Truſtees empowered to alter or change the Securities on which the Moneys be placed, and to apply the Children's Share of the Principal for putting any or either of them to Buſineſs, or ſetting them up therein, or advancing them in Marriage.*
6. *Indemnified againſt Expences and involuntary Loſs.*
7. *Appointed Executors, and conſtituted Guardians with Teſtator's Wife.*

IN THE NAME OF GOD, AMEN. I William Wharton, of the pariſh of Saint Martin in the Fields, in the county of Middleſex, Upholſterer, being ſick and weak in body, but of ſound and diſpoſing mind, memory and underſtanding, thanks be to God for the ſame, do make this my laſt will and teſtament in manner following:

1. WHEREAS my dear and loving wife Martha Wharton is provided for by ſettlement made on her marriage, and thereby, on my death, will, amongſt other things, be entitled to, and poſſeſſed of a dwelling-houſe, meſſuage, or tenement, ſituate and being at Knightſbridge, in the pariſh of Saint George, Hanover Square, in the ſaid county of Middleſex, for the term of her life: Now, in token of the love and affection I have and bear for and towards my ſaid wife, I give and bequeath to her all the plate, linen, china,

china, houſehold goods, and furniture of all kinds, which ſhall be in the aforeſaid dwelling-houſe at the time of my death, and alſo the ſum of 20 guineas for a ring and mourning.

2. AND I give and bequeath to my brothers John and Thomas Wharton the like ſum of 20 guineas each for a ring and

3. mourning. ALSO, I give and bequeath unto John Jones, and Thomas Jenkins, of Knightſbridge aforeſaid, Eſquires, my executors and truſtees hereinafter named, the ſum of 60 l each, for the care and trouble they may have in executing this my will, and performing the truſts hereby in them re-

4. poſed. ALL the reſt, reſidue and remainder of my plate, linen, china, houſehold goods and furniture, and all other my goods, chattels, ſtock in trade, eſtate, and effects of what nature or kind ſoever, not herein-before given or bequeathed, I give and bequeath unto the ſaid John Jones and Thomas Jenkins, TO HOLD to them the ſaid John Jones and Thomas Jenkins, their executors, adminiſtrators and aſſigns, upon this ſpecial truſt and confidence nevertheleſs, that is to ſay, that they my ſaid truſtees, or the ſurvivor of them, or the executors or adminiſtrators of ſuch ſurvivor, do and ſhall, as ſoon as convenient after my death, ſell and diſpoſe thereof, and call in and receive all ſuch debts, ſum or ſums of money, as ſhall be due or owing to me at the time of my death, and place the moneys ariſing by ſuch ſale or diſpoſal, and the moneys ſo to be called in and received upon government, or other good and ſufficient ſecurity, in their own names, and in ſuch manner as they ſhall think proper. AND ALSO in truſt, that they do and ſhall receive the intereſt and dividends thereof from time to time, as the ſame ſhall become payable, and pay, apply, and diſpoſe of the ſame, or a ſufficient part thereof, for and towards the maintenance, education, ſupport, and bringing up of my ſon James, and my daughters Mary and Elizabeth Wharton, and ſuch other child or children, as I ſhall have living, or that my ſaid wife may be enſient with at the time of my death, until my ſaid children ſhall ſeverally and reſpectively attain their ſeveral and reſpective ages of 21 years; and when and as my ſaid children ſhall ſeverally and reſpectively attain their ſaid ages of 21 years; in truſt to pay, aſſign, transfer, and convey all the ſaid reſidue of my eſtate and effects with the intereſt, dividends, and produce thereof, as ſhall not have been applied for and towards the maintenance and education of my ſaid children as aforeſaid, or for putting any or either of them to buſineſs or otherwiſe, advancing any or either of them in life, purſuant to the power hereinafter for that purpoſe contained, equally unto and amongſt all my ſaid children, when and as they ſhall ſeverally and reſpectively attain their ſaid ages of 21 years: and

in

in caſe only one of my ſaid children ſhall live to attain his or her age of 21 years; then in truſt to pay, aſſign, transfer, and convey all the ſaid reſidue of my eſtate and effects, and the intereſt, dividends, and produce thereof, or ſuch part thereof as ſhall remain unapplied as aforeſaid, unto ſuch only child. But in caſe any or either of my ſaid children ſhall happen to die under age, leaving iſſue of his, her, or their body or bodies lawfully begotten; then in truſt to pay, aſſign, transfer, and convey the part or ſhare of ſuch deceaſed child or children unto ſuch his, her, or their iſſue, ſhare and ſhare alike (if more than one) when and ſo ſoon as they ſhall ſeverally and reſpectively attain their ſeveral and reſpective ages of 21 years, and to pay and apply the intereſt, dividends, and produce thereof, in the mean time, for and towards their reſpective maintenance and education. But in caſe all and every of my ſaid children ſhall happen to die under age, and without leaving iſſue of his, her or their body or bodies lawfully begotten; then in truſt to pay, aſſign, transfer, and convey the ſaid reſidue of my eſtate and effects, and the intereſt, dividends, and produce thereof, or ſuch part thereof as ſhall remain unapplied as aforeſaid, unto my ſaid dear and loving wife Martha Wharton, her executors, adminiſtrators, and aſſigns. But in caſe ſhe ſhall be then dead; then in truſt, to pay, aſſign, transfer, and convey the ſame unto my aforeſaid two brothers John and Thomas Wharton, or ſuch one of them as ſhall be then living; and I do hereby empower and direct my ſaid truſtees to pay, aſſign, transfer and convey the ſame accordingly.

5. And I do authorize and empower my ſaid truſtees, from time to time, as often as they ſhall think proper, to alter and change the ſecurities on which the ſaid reſidue of my eſtate and effects ſhall hereafter be placed out, and from time to time, as often as they ſhall think fit, again to place the ſame out upon government, or ſuch other good and ſufficient ſecurity or ſecurities as they ſhall think proper; and I do hereby alſo authorize and empower my ſaid truſtees to apply the reſpective part or ſhare of any or either of my aforeſaid children, or the reſpective part or ſhare of any or either of their lawful iſſues (in caſe any or either of them die under age leaving iſſue as aforeſaid) of and in the ſaid reſidue of my eſtate and effects, for putting any or either of my ſaid children, his, her, or their lawful iſſue, out to buſineſs, or any ſuitable employ, or for ſetting him, her or them up in buſineſs, or advancing him, her or them reſpectively, in any employ or otherwiſe, for his, her or their reſpective advancement in the world by marrying, or otherwiſe howſoever, any thing in this my will contained

6. to the contrary thereof in any wiſe notwithſtanding. And it is my will and meaning, that my ſaid truſtees, or either of

of them, ſhall not be liable to anſwer or make good any loſs or loſſes that ſhall or may happen to the aforeſaid reſidue of my eſtate and effects, in placing out the truſt moneys, according to the directions in this my will, or in tranſacting any money affairs, or otherwiſe relating to or concerning the execution of the truſts mentioned in this my will, unleſs the ſame ſhall appear to happen by or through their or either of their wilful neglect or default; nor ſhall either of them my ſaid truſtees be anſwerable or accountable for the acts, deeds, receipts, or diſburſements of the other of them; but each of them ſhall be anſwerable only for his own ſeparate acts, deeds, receipts and diſburſements: And I do hereby direct that my ſaid truſtees ſhall and may pay and reimburſe themſelves and himſelf out of the aforeſaid reſidue of my eſtate and effects, all reaſonable and neceſſary coſts, charges and expences whatſoever, that they or either of them ſhall or may bear, pay, be put unto, or ſuſtain in or about the execution of this my will, or the truſt
7. hereby in them repoſed. AND LASTLY, I do hereby nominate, conſtitute and appoint my ſaid truſtees the ſaid John Jones and Thomas Jenkins, executors of this my laſt will and teſtament: and I do hereby alſo nominate, conſtitute and appoint my ſaid wife, ſo long as ſhe ſhall continue my widow, and no longer, together with my ſaid truſtees, guardians of my aforeſaid ſon James, and my daughters Mary and Elizabeth Wharton, and of all, any, and every ſuch other child or children as I ſhall have living, or that my ſaid wife may be enſient with at the time of my death[f]; and do hereby revoke and make void all former and other will and wills by me at any time heretofore made, and do declare this to be my laſt will and teſtament: IN WITNESS whereof I have at the bottom of the two firſt ſheets of this my will (the whole whereof is contained in three ſheets of paper) ſubſcribed my name, and to this third and laſt ſheet, my hand and ſeal[g] the day of in the year of our Lord 17 .

SIGNED, ſealed, &c. [*as in* No. I.] } WILLIAM WHARTON. [Place of the Seal.]

[f] To appoint guardians, any father has power, as was ſhewn in page 102.

[g] When the will is contained in more than one ſheet of paper, the ſheets in which it is contained are uſually tied together at the top with incle or tape, and then the teſtator writes his name on the right hand ſide, at the bottom of each, and puts his ſeal to the laſt. The witneſſes write their names at the bottom on the left hand ſide of all the ſheets; in the laſt whereof, over the place where thoſe write their names, it is wrote "*Signed, ſealed, &c.*" [as in No. I.] but in the other Sheets only the ſingle word "*Witneſſes,*" is wrote juſt over the place where they write their names.

NUMBER

NUMBER VII.

A MAN poſſeſſed of real Eſtates, copyhold Eſtates of Inheritance, perſonal Eſtate, and Effects.

1. *Deviſes a real Eſtate to one in Fee-ſimple.*
2. *An Annuity to a Siſter for Life, payable out of every of Teſtator's freehold and copyhold Eſtates, except the Eſtate before deviſed; to be paid by half-yearly Payments free of all charges, &c. with Power for Annuitant to enter and diſtrain after twenty Days Non-payment.*
3. *Another Annuity to Wife out of ſame Eſtates, payable in the ſame Manner, and with the ſame Power to diſtrain as given to the Siſter.*
4. *Another to a Couſin out of ſame Eſtates, payable to her at a certain Sum per Week (excluſive of her Huſband's Controul), with ſame Power to enter for Non-payment, as given to the Siſter.*
5. *Deviſes the Eſtates chargeable with all the Annuities to another Siſter for Life.*
6. *After the Siſter's Death veſts the ſame in Truſtees for preſerving Contingencies, &c.*
7. *Deviſes the ſame Eſtates to another Siſter for Life.*
8. *The ſame to a Man for Life. Then to Deviſee's Iſſue Male in Tail general; and in Default of Iſſue Male to Iſſue Female, and the Heirs Male of their Bodies.*
9. *In Default of Iſſue from laſt-mentioned Deviſee, deviſes the Eſtates to a Kinſman for Life. Then to Kinſman's Iſſue Male in Tail general.*
10. *Charges the Eſtates with Payment of a certain Sum, if laſt-mentioned Deviſee, or his Iſſue, have them by the Deviſe.*
11. *If laſt-mentioned Deviſee die without Iſſue; ſame Eſtates deviſed to another Perſon for Life, and then to his Iſſue; and on Failure thereof to Teſtator's own right Heirs for ever.*
12. *Directs Debts, &c. to be paid out of perſonal Eſtate.*
13. *Deviſes to a public Charity.*
14. *Pecuniary and ſpecific Legacies to a Siſter.*
15. *Reſidue to Wife, and appoints her and a Siſter Executrixes.*

IN THE NAME OF GOD, AMEN. I Thomas Noble, of Fenchurch-ſtreet, in the city of London, Eſquire, being ſick and weak in body, but of ſound and diſpoſing mind, memory, and underſtanding, praiſed be God for the ſame, do

do make and declare this my laſt will and teſtament, in
1. manner and form following, that is to ſay, I give and deviſe all that my meſſuage or tenement, land, and hereditaments, with the appurtenances, ſituate, lying and being in the pariſh of Roſeneſne, in the county of Denbigh, and now in the tenure or occupation of David Bruce, yeoman, unto William Noble, of the pariſh of St. Aſaph, in the ſaid county of Denbigh, clerk, his heirs and aſſigns for ever:
2. Also, I give, grant, and deviſe unto my ſiſter Elizabeth Coleman, widow, and her aſſigns, for and during the term of her natural life, one clear yearly annuity, rent-charge, or ſum of 40l, of lawful money of Great Britain, to be iſſuing and payable out of all and every other my freehold eſtate or eſtates, ſituate and being in the ſaid counties of Denbigh and Middleſex, or either of them, or elſewhere, not herein before deviſed, and out of my copyhold eſtate, ſituate, lying and being at Potters Barr, in the ſaid county of Middleſex (which ſaid copyhold eſtate I have ſurrendered to the uſe of this my will [h]), the ſaid annuity or rent-charge to be paid to my ſaid ſiſter by equal half-yearly payments, the firſt whereof to begin and be made at the end and expiration of ſix kalendar months next after my deceaſe, and always to be paid free and clear of and from all manner of taxes, charges, and impoſitions whatſoever, to be taxed, charged, or aſſeſſed upon the ſaid annuity, or upon my ſaid ſiſter, in reſpect thereof by authority of parliament, or otherwiſe howſoever; and if it ſhall happen that the ſaid annuity or rent-charge of 40l, or any part thereof, ſhall be behind or unpaid by the ſpace of 20 days next over or after any or either of the ſaid days whereon the ſame is made payable, and ought to be paid as aforeſeid (being lawfully demanded), that then and from thenceforth, and from time to time as often as the ſame or any part thereof, ſhall be ſo in arrear and unpaid, it ſhall and may be lawful to and for my ſaid ſiſter Elizabeth Coleman, and her aſſigns, upon the ſaid freehold and copyhold eſtate and eſtates, every or any part or parts thereof to enter and diſtrain, and the diſtreſs and diſtreſſes there found to take, lead, drive, and carry away, and to impound, detain, or otherwiſe to ſell and diſpoſe of the ſame, until thereby or otherwiſe, ſhe and they

[h] See the reaſon of this ſurrender, page 128.

ſhall

ſhall be lawfully ſatisfied and paid ſuch annuity or yearly rent-charge, or ſo much thereof as ſhall be in arrear, together with all coſts, charges and expences whatſoever as ſhall
3. be occaſioned by ſuch entry, diſtreſs, and ſale[1]. ALSO, I give, grant and deviſe unto my beloved wife Jane Noble and her aſſigns, one annuity or clear yearly rent-charge of 40 l, of lawful money of Great Britain, for and during the term of her natural life, to be iſſuing and payable out of and from all and every my ſaid other freehold and copyhold eſtate and eſtates aforeſaid, not herein before particularly deviſed, and to be payable to her half-yearly; in the manner and with the like power for my ſaid wife Jane Noble to enter upon the ſaid premiſes, and to make diſtreſs and diſtreſſes, and to make ſale thereof in caſe of non-payment of ſuch annuity, or any part thereof, as is herein before given to my ſiſter Elizabeth Coleman, in caſe of non-payment of her annuity or rent-charge of 40 l, or any part thereof as aforeſaid.
4. ALSO, I give, grant and deviſe unto my couſin Frances Jones, wife of John Jones, of Wrexham, in the county of Denbigh aforeſaid, tallow chandler, one other annuity or clear yearly rent-charge of 10 l 8 s of lawful money of Great Britain, for and during the term of her natural life, to be iſſuing and payable out of and from all and every my ſaid other freehold and copyhold eſtate and eſtates aforeſaid, not herein before particularly deviſed, and to be paid to her weekly after the rate of 4s a week; and her receipt ſhall be a ſufficient diſcharge for the ſame, which ſhall not be ſubject to the control or intermeddling of her ſaid huſband John Jones; with the like power and with the ſame authority for the ſaid Frances Jones to enter upon the ſaid premiſes, and to make diſtreſs and diſtreſſes, and to make ſale thereof in caſe of non-payment of ſuch annuity, or any part thereof, as is herein before given to my ſaid ſiſter Elizabeth Coleman, in caſe of non-payment of her annuity or rent-charge
5. of 40 l a year, or any part thereof as aforeſaid. ALSO, I give and deviſe all and every other my ſaid freehold and

[1] This annuity being charged on real eſtate, the executor has no more concern therewith than he has with a deviſe of real eſtate, mentioned page 156, wherefore the annuitant may enter and make diſtreſs and ſale without his intervention.

copyhold

copyhold eſtate and eſtates whereſoever as aforeſaid, not herein before particularly deviſed, but charged and chargeable with the payment of the ſaid reſpective yearly annuities or rent-charges herein before particularly mentioned, unto my ſiſter Mary Noble, ſpinſter, for and during the term of
6. her natural life: AND from and immediately after the determination of that eſtate, by forfeiture or otherwiſe, I give and deviſe the ſame, and every part thereof, unto James Spence and Daniel Downing, of Tottenham-court-road, in the ſaid county of Middleſex, gentlemen, and to their heirs, in truſt only, to preſerve and ſupport the contingent remainders and uſes herein after limited from being defeated, barred, or deſtroyed; and for that purpoſe, from time to time, and at all times, to make entries and bring actions as occaſion may be or require; nevertheleſs to permit and ſuffer the ſaid Mary Noble to receive and take the rents, iſſues, and profits thereof for and during the term of her natural
7. life: AND from and immediately after the deceaſe of my ſaid ſiſter Mary Noble, I give and deviſe all and every my ſaid other freehold and copyhold eſtate and eſtates, ſo given to my ſaid ſiſter Mary Noble for life as aforeſaid, and charged and chargeable with the ſeveral and reſpective annuities as aforeſaid, unto and to the uſe of my ſaid ſiſter Elizabeth Coleman during the term of her natural life; and from and immediately after the determination of that eſtate by forfeiture or otherwiſe, then I give and deviſe the ſame, and every part thereof, unto the ſaid James Spence and Daniel Downing, and their heirs in truſt as aforeſaid, to preſerve and ſupport, &c. [*as in clauſe* 6, *only a*
8. *different name*]. AND after her deceaſe, then I give and deviſe all and every my ſaid other freehold and copyhold eſtate and eſtates whereſoever, deviſed to my ſaid ſiſter Elizabeth Coleman as aforeſaid, and charged and chargeable as aforeſaid, unto the ſaid William Noble for and during the term of his natural life; and from and immediately after the determination of that eſtate by forfeiture or otherwiſe, I give and deviſe the ſame, and every part thereof, unto the ſaid James Spence and Daniel Downing and their heirs, in truſt as aforeſaid to preſerve and ſupport, &c. [*as in clauſe* 6, *only a different name*], and from and immediately after the deceaſe of the ſaid William Noble, I give and deviſe all and every my ſaid other freehold and copyhold eſtate and eſtates ſo given to the ſaid William Noble for life as afore-

aforeſaid, and charged and chargeable as aforeſaid, unto and to the uſe and behoof of the firſt ſon lawfully begotten, or to be begotten of the ſaid William Noble, and the heirs male of the body of ſuch firſt ſon lawfully iſſuing; and for default of ſuch iſſue, to the uſe and behoof of the ſecond, third, and all and every other ſon and ſons of the ſaid William Noble, and the heirs male of the body and bodies of ſuch ſecond, third, and other ſon and ſons lawfully begotten or to be begotten, ſeverally and ſucceſſively, as they ſhall be in ſeniority of age and priority of birth; that is to ſay, the eldeſt of ſuch ſon and ſons, and the heirs male of his and their body and bodies being always to be preferred before the younger of ſuch ſon and ſons, and the heirs male of his and their body and bodies lawfully to be begotten; and for default of ſuch iſſue, then I give and deviſe all and every my ſaid other freehold and copyhold eſtate and eſtates whereſoever as aforeſaid deviſed, to the firſt daughter of the ſaid William Noble, lawfully begotten or to be begotten, and to the heirs male of the body of ſuch firſt daughter lawfully iſſuing; and for default of ſuch iſſue, then to the uſe and behoof of the ſecond, third, and all and every other daughter and daughters of the ſaid William Noble, and to the heirs male of the body and bodies of ſuch ſecond, third, and other daughter, lawfully begotten, or to be begotten, ſeverally and ſucceſſively, as they ſhall be in
9. ſeniority of age and priority of birth: And for default of ſuch iſſue, then I give and deviſe all and every my ſaid other freehold and copyhold eſtate and eſtates whereſoever, ſo deviſed to the iſſue of the ſaid William Noble as aforeſaid, and charged and chargeable as aforeſaid, unto and to my kinſman John Banks, ſon of Thomas Banks of Wrexham, in the county of Denbigh aforeſaid, tallow-chandler, by Jane his wife, for and during the term of his natural life; and from and immediately after the determination of that eſtate, by forfeiture or otherwiſe, then I give and deviſe the ſame, and every part thereof unto the ſaid James Spence and Daniel Downing, and their heirs in truſt as aforeſaid, to preſerve and ſupport, &c. [*as in clauſe 6, only a different name*], and from and immediately after the deceaſe of the ſaid John Banks, I give and deviſe all and

every my ſaid other freehold and copyhold eſtate and eſtates whereſoever, ſo given to the ſaid John Banks for life, as aforeſaid, and charged and chargeable as aforeſaid, unto and to the uſe of the firſt ſon of the ſaid John Banks, lawfully begotten, &c. [*the ſame as to the iſſue of William*
10. *Noble in clauſe* 8.] And my will is, that in caſe the above-named John Banks or his iſſue ſhall at any time hereafter be ſeiſed and poſſeſſed of the freehold and copyhold eſtates ſo deviſed as aforeſaid, the ſum of 100l ſhall then be paid to William Banks, brother of the ſaid John Banks; and I do hereby charge the ſaid eſtates with the payment thereof
11. accordingly: And for default of ſuch iſſue of the ſaid John Banks, I give and deviſe all and every my ſaid other freehold and copyhold eſtate and eſtates whereſoever, ſo deviſed to the iſſue of the ſaid John Banks, as aforeſaid, and charged and chargeable with the payment of the ſeveral annuities, as aforeſaid, unto and to Thomas Watſon, of, &c. and his iſſue [*in ſame manner as deviſed to William Noble in clauſe* 8.], and for want of ſuch iſſue, to my own right heirs for ever[1].
12. And I do will, order, and direct, that all my juſt debts, funeral expences, and the charges of proving this my will, be, by my executors herein after named, paid and diſcharged
13. out of my perſonal eſtate; and after payment thereof, I give and bequeath to the preſident, treaſurer, and governors of Chriſt's Hoſpital, London, the ſum of 200l for the uſe of the ſaid hoſpital; the ſame to be paid within nine
14. months after my deceaſe. Also, I give and bequeath unto my ſaid ſiſter Elizabeth Coleman, the ſum of 20l, my gold watch, ſilver pint and quart cups, marked T. N. and
15. all my ſilver tea-ſpoons. All the reſt, reſidue and remainder of my perſonal eſtate, of what nature or kind ſoever, I give and bequeath the ſame, and every part thereof

1 By thoſe deviſes and limitations begun at clauſe 5, may be perceived how a man may diſpoſe of his lands to as many perſons as are in being for life, with remainders in tail to as many of them as he thinks fit; and hereby he acts conſiſtent with the rules of law and equity; as here, although neither of the perſons to whom thoſe eſtates are in this manner deviſed for life, can convey for any longer term than his or her own life; yet the iſſue to whom the eſtates are limited, and who will by this deviſe take eſtates tail, either of them, when in poſſeſſion, may be enabled, by ſuffering a common recovery, to convey the inheritance: So where real eſtate is deviſed to any one in fee-tail general (defined, p. 115.) without any remainder or reverſion expectant thereon, the intail may be effectually barred by a fine.

(after the payment of my debts, funeral expences, charges of proving this my will, and legacies as aforeſaid) unto my ſaid wife Jane Noble: AND I do hereby nominate, conſtitute, and appoint my ſaid wife Jane Noble, and my ſaid ſiſter Elizabeth Coleman, executrixes of this my laſt will and teſtament; hereby revoking and making void all former wills and teſtaments at any time heretofore by me made, and do declare this to be my laſt will and teſtament. IN WITNESS whereof I have, at the bottom of the three firſt ſheets of this my will (the whole whereof is contained in four ſheets of paper), ſubſcribed my name, and to this fourth and laſt ſheet my hand and ſeal, the day of in the year of our Lord 17 .

SIGNED, ſealed, &c. [*as in* No. I. *only here muſt be three witneſſes.*] THOMAS NOBLE. [Place of the Seal.]

NUMBER VIII.

A MAN makes his Will of his real Eſtate only, and deviſes the ſame to a ſingle Woman, chargeable with an Annuity given to his natural daughter thereout.

1. *Deviſes the Eſtate ſubject to the Annuity.*
2. *Gives the Annuity payable Half-yearly, with Power to enter and diſtrain after* 20 *Days Non-payment.*
3. *Power to enter and receive the Rents after* 40 *Days Non-payment.*

IN THE NAME OF GOD, AMEN, I, M. J. of the pariſh of —— in the county of Middleſex, gentleman, being in health of body, and of ſound and diſpoſing mind, memory, and underſtanding, praiſed be God for the ſame, do make
1. this my laſt will, in manner following: I give and deviſe unto Iſabella Puella, of the pariſh of —— aforeſaid, ſingle woman, all that my meſſuage, tenement, land, and hereditaments, with the appurtenances, ſituate, lying, and being at ——, and now in the tenure or occupation of ——; TO HOLD unto her the ſaid Iſabella Puella, her heirs and aſſigns for ever; SUBJECT nevertheleſs to, and charged and chargeable with, the annuity, yearly rent, or ſum of forty pounds,
2. herein after mentioned. AND I do hereby give, deviſe, and bequeath, unto Jane Puella, (the natural daughter of

the ſaid Iſabella Puella), and her aſſigns, for and during the term of her natural life, one annuity or clear yearly rent or ſum of 40l of lawful money of Great Britain, free of all taxes and other deductions, parliamentary or otherwiſe, to be iſſuing and payable out of the ſaid meſſuage or tenement, land, and hereditaments, and to be paid and payable by half-yearly payments, at and upon the feaſt-days of *Saint John the Baptiſt* and the *birth of our Lord Chriſt*; the firſt payment thereof to be on ſuch of the ſame feaſt days as ſhall firſt and next happen after my deceaſe; and I do hereby charge and ſubject the ſaid meſſuage or tenement, land, and hereditaments, to and with the payment of the ſaid annuity, yearly rent, or ſum of 40l, accordingly: and my will is, that in caſe the ſaid annuity, or any part thereof, ſhall be behind or unpaid by the ſpace of twenty days next after either of the aforeſaid feaſt-days whereon the ſame is herein before directed to be paid as aforeſaid (being lawfully demanded), that then and ſo often as the ſame, or any part thereof, ſhall be ſo in arrear, it ſhall and may be lawful for the ſaid Jane Puella, and her aſſigns, to enter upon the ſaid premiſes charged with the ſaid annuity as aforeſaid, and diſtrain for the ſame, or for ſo much thereof as ſhall be ſo in arrear, and the diſtreſs and diſtreſſes then and there found to detain and keep, until ſhe ſhall be fully paid and ſatisfied all ſuch arrearages, with coſts and charges in and about the making and keeping thereof. 3. And in caſe the ſaid annuity, or any part thereof, ſhall be behind and unpaid by the ſpace of forty days next after either of the ſaid days of payment whereon the ſame ought to be paid as aforeſaid, that then and ſo often as the ſame, or any part thereof, ſhall be ſo in arrear, it ſhall and may lawful for the ſaid Jane Puella and her aſſigns, into all and ſingular the premiſes charged with the ſaid annuity as aforeſaid, to enter, and the rents, iſſues, and profits thereof to receive and take, until ſhe be therewith and thereby, or by the perſon or perſons who ſhall be then entitled to the immediate poſſeſſion of the premiſes, paid and ſatisfied the ſame, and every part thereof, and all the arrears thereof incurred before, and that ſhall incur during ſuch time as ſhe ſhall receive the rents, iſſues, and profits thereof, or be entitled to receive the ſame by virtue of

of ſuch entry to be made as aforeſaid, together with her coſts, charges, and expences, laid out and ſuſtained by reaſon of the non-payment thereof, or any part thereof. IN WITNESS whereof I have hereunto ſet my hand and ſeal, the day of in the year of our Lord 17 .

SIGNED, ſealed, &c. [*as in* No. I. *only here muſt be three witneſſes.*] M. J. [Place of the Seal.]

NUMBER IX.

A CODICIL,

Whereby a Will is altered and new Legacies given.

WHEREAS I John Manning, of Fleet-ſtreet, in the city of London, hoſier, have made and duly executed my laſt will and teſtament in writing, bearing date the 4th day of September 1785, and thereby given and bequeathed the ſum of 200l unto Thomas Mun; NOW, I do hereby revoke and make void the ſaid legacy of 200l, ſo given and bequeathed by my ſaid will unto the ſaid Thomas Mun, and do give and bequeath the ſaid ſum of 200l unto James Franks, of Cheapſide, London, haberdaſher: ALSO, I do revoke and make void the two ſeveral legacies of 100l a piece, given and bequeathed by my ſaid will unto Chriſtopher Ham and William Ham, and do give and bequeath unto the ſaid Chriſtopher Ham and William Ham the ſum of 40l apiece, and no more: AND I do hereby give and bequeath unto Richard Win, of Foſter-lane, London, cordwainer, the ſum of 120l. And I do ordain and declare this preſent writing to be a codicil to my ſaid will, and that the ſame ſhall be annexed thereto and taken as part thereof; and do confirm my ſaid will in every particular thereof that is not hereby altered or revoked: IN WITNESS whereof I have to this

this codicil ſet my hand and ſeal the day of in the year of our Lord 17 .

SIGNED, *ſealed, declared, and publiſhed by the ſaid John Manning, as and for a codicil to be annexed to his laſt will and teſtament, and to be taken as part thereof in the preſence of*

JOHN MANNING. [Place of the Seal.]

Two witneſſes. [See a codicil deſcribed, page 167, 168.]

NUMBER X.

A NUNCUPATIVE WILL.

THE LAST WILL of Thomas Mors, late of Rude-lane, in the city of London, gentleman, deceaſed, declared by him by word of mouth the 4th day of September 1785: [*here inſert the words as ſpoken by the deceaſed, and concludes thus*], Thoſe were the words ſpoken by the ſaid deceaſed Thomas Mors, in the preſence of us who have hereunto ſubſcribed our names as witneſſes thereof, this day of 17 .

Three witneſſes. [See a definition of this will, p. 161, 162.]

NUMBER XI.

A RELEASE or DISCHARGE for a Legacy.—See the Stamp on which it muſt be written, Page 64—66.

TO ALL TO WHOM theſe preſents ſhall come, I John Franks of Wood-ſtreet, in the city of London, ſilverſmith, *ſend greeting*. WHEREAS Thomas Smith, of Fleet-ditch, in the ſaid city of London, butcher, deceaſed, in and by his laſt will and teſtament

ment in writing, bearing date on or about the 4th day of September 1785, did give and bequeath unto me the ſaid John Franks the ſum of 60 l, and the ſaid Thomas Smith, by his ſaid will, made and conſtituted William Mun and James Dun executors thereof. NOW THESE PRESENTS WITNESS, That I the ſaid John Franks do hereby acknowledge to have received of and from the ſaid William Mun and James Dun the ſaid ſum of 60 l, ſo given and bequeathed to me in and by the ſaid will of the ſaid Thomas Smith as aforeſaid, and thereof, and of and from every part thereof, do fully, clearly, and abſolutely acquit releaſe, and for ever diſcharge the ſaid William Mun and James Dun, their heirs, executors, adminiſtrators, and aſſigns, and alſo the eſtate and effects of the ſaid teſtator, and every part thereof; and in conſideration thereof, I the ſaid John Franks do, for myſelf, my executors, adminiſtrators, and aſſigns, remiſe and releaſe unto the ſaid William Mun and James Dun, their heirs, executors, and adminiſtrators, all and all manner of action and actions, cauſe and cauſes of action, ſuits, legacies, ſum and ſums of money, judgments, executions, claims, and demands whatſoever, both at law and in equity, which againſt the ſaid William Mun and James Dun, their heirs, executors, or adminiſtrators, or the eſtate or effects of the ſaid teſtator, I the ſaid John Franks ever had, or which I, my executors, adminiſtrators or aſſigns, can or may have, claim, challenge, or demand, for or by reaſon or means, or on account of the ſaid ſum of 60 l, ſo given and bequeathed to me in and by the ſaid laſt will and teſtament of the ſaid Thomas Smith as aforeſaid. IN WITNESS whereof I ſaid John Franks have hereunto ſet my hand and ſeal the day of in the year of our Lord 17 .

SEALED *and delivered in the preſence of*

Simon Simpſon.
Noah Moor.

JOHN FRANKS. [Place of the Seal.]

FINIS.